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DEBT AND DEMOCRACY: TOWARDS A CONSTITUTIONAL THEORY OF BANKRUPTCY

*Jonathan C. Lipson**

This Article explores certain important constitutional challenges presented by bankruptcy. Article I, Section 8, Clause 4 of the Constitution provides that Congress shall have the power to make “uniform Laws on the subject of Bankruptcies.” While there are many good social, political, and economic theories of bankruptcy, there has been comparatively little effort to address broadly what it means to have constitutionalized financial distress. This Article is a first step in that direction.

Constitutional problems with bankruptcy are not new, but present three underappreciated puzzles: First, why did the Framers put a bankruptcy power in the Constitution, and how broadly should we construe its “peculiar” language today? Second, how should this power interact with structural features of our constitutional system, whether vertical (vis-à-vis states) or horizontal (vis-à-vis other branches)? Third, how should we resolve competitions between this power and substantive protections involving, for example, property, due process, and religious liberties? Recent Supreme Court decisions broadly interpreting the Bankruptcy Clause, the 2005 amendments to the Bankruptcy Code, and the continuing spate of Catholic diocese bankruptcies, among other things, give these puzzles some urgency.

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This Article identifies an important, and thus far undeveloped, theme in the constitutional implications of bankruptcy: "bankruptcy exceptionalism." Bankruptcy exceptionalism is an operating principle that helps to explain why we have a Bankruptcy Clause and how it has sometimes permitted or compelled exceptions to constitutional rules, standards, norms, and values in order to accommodate the exigencies of financial distress. The Article argues that the bankruptcy power gives Congress broad discretion to legislate in response to financial distress, subject to certain important democratic and countermajoritarian protections.

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[T]he most important law of any society [is] the law regulating the relation of debtor and creditor.

—James A. Bayard¹

Shoplifting is wrong; bankruptcy is also a moral act. Bankruptcy is a moral as well as an economic act. There is a conscious decision not to keep one's promises.

—H.R. REP. NO. 109-31²

[B]ankruptcy law has little to do with natural justice.

—Justice Antonin Scalia³

Constitutional doctrine? Who needs it! All it brings is trouble and strife.

—John D. Ayer⁴

INTRODUCTION

Bankruptcy is among the most political—or politicized—of the business law subjects. It is the place where many of our most difficult social problems—from mass torts to securities fraud to the plight of the working poor—come to rest. Over the years, we have developed many useful theories of the political economy of bankruptcy, including institutional and socioeconomic explanations for how the United States has produced what is by many accounts a unique (and perhaps uniquely controversial) bankruptcy system.⁵ Oddly, there is no general account of the constitutional framework on which this political debate rests.⁶ This Article is a first step toward filling that gap.

1 9 ANNALS OF CONG. 2664 (1799) (statement of Rep. Bayard), *quoted in* BRUCE H. MANN, *REPUBLIC OF DEBTORS* 213 (2002).

2 H.R. REP. NO. 109-31, at 2 n.1 (2005).

3 *Dewsnup v. Timm*, 502 U.S. 410, 435 (1992) (Scalia, J., dissenting).

4 John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 MICH. L. REV. 963, 985 (1989).

5 Some of this literature is summarized *infra* Part I.

6 This is obviously not to say that we are wholly without constitutional theorizing on certain aspects of bankruptcy. Some of the better contributions include Ayer, *supra* note 4; Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 SUP. CT. REV. 25 [hereinafter Baird, *Bankruptcy Procedure*]; Douglas G. Baird, *Jury Trials After Granfinanciera*, 65 AM. BANKR. L.J. 1 (1991); Douglas G. Baird & Robert K. Rasmussen, *Boyd's Legacy and Blackstone's Ghost*, 1999 SUP. CT. REV. 393; Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 862–77 (2000); Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571 (2005); S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967 (1988); Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063, 1076–89 (2002) [hereinafter Plank, *Federalism*]; Thomas E. Plank, *The*

We do not typically think of bankruptcy as a subject so grave as to warrant constitutional consideration. But the Framers of the Constitution apparently thought otherwise. They gave to Congress—with surprisingly little debate—the power to make “uniform Laws on the subject of Bankruptcies throughout the United States.”⁷ As a problem of constitutional dimension, bankruptcy presents at least three sets of puzzles.

First, there are *organic* questions that go to the source and text of the bankruptcy power. Why, for example, did we constitutionalize bankruptcy at all? Bankruptcy is not typically a provision of other nations’ constitutions.⁸ Nor was—or is—it part of England’s constitution,⁹ whose bankruptcy system was an important influence on ours.¹⁰ Wouldn’t some combination of the Commerce,¹¹ Necessary and

Constitutional Limits of Bankruptcy, 63 TENN. L. REV. 487 (1996) [hereinafter Plank, *Limits*]; Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567 (1998) [hereinafter Plank, *Article III*]; James Steven Rogers, *The Impairment of Secured Creditors’ Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973 (1983). My own attempts in this regard include Jonathan C. Lipson, *Fighting Fiction with Fiction: The New Federalism in (a Tobacco Company) Bankruptcy*, 78 WASH. U. L.Q. 1271, 1291–339 (2000) [hereinafter Lipson, *Fighting Fiction*]; Jonathan C. Lipson, *First Principles and Fair Consideration: The Developing Clash Between the First Amendment and the Constructive Fraudulent Conveyance Laws*, 52 U. MIAMI L. REV. 247, 272–303 (1997) [hereinafter Lipson, *First Principles*]; Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 595–635 (2000) [hereinafter Lipson, *On Balance*]; Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 S. CAL. L. REV. 363, 408–35 (2006) [hereinafter Lipson, *Churches*]. The gap in all of these works—mine included—is the failure to develop a broader theory of the role that bankruptcy plays in the constitutional order.

7 U.S. CONST. art. I, § 8, cl. 4.

8 According to data provided by the Comparative Constitutions Project, directed by Professors Zachary Elkins and Tom Ginsburg at the University of Illinois, twenty-seven nations have, at various points, generated forty-six constitutions that mention bankruptcy or insolvency in some way. Some of these countries—for example, Australia, Canada, and Switzerland—are not surprising. Others, however—Afghanistan, Cambodia, Uruguay, and Zambia—are. See Comparative Constitutions Project, <https://netfiles.uiuc.edu/zelkins/constitutions/> (last visited Jan. 9, 2008) (specific data on file with author).

9 See generally WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (Paul Smith ed., Cambridge Univ. Press 2001) (describing, comprehensively, England’s unwritten constitution).

10 See Charles Jordan Tabb, *History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 6–7 (1995).

11 U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power “[t]o regulate Commerce . . . among the several States”).

Proper,¹² and Supremacy¹³ Clauses have given Congress sufficient power to enact bankruptcy laws? What does its “peculiar” uniformity language mean?¹⁴ Should we care that in 1787 bankruptcy generally connoted a scope of relief far narrower than is currently contemplated?

Second, there are *structural* questions. Although the Constitution gives Congress the power to make uniform laws on the subject of bankruptcy, Congress has in turn outsourced much of this work to specialized bankruptcy courts, whose constitutional status is anything but clear, both vertically (meaning vis-à-vis the states) and horizontally (meaning vis-à-vis other federal actors, in particular Article III courts). Bankruptcy is alone among major federal powers in that it is conducted almost entirely in courts, rather than in an administrative apparatus. Why is bankruptcy the work of courts, and what is their jurisdictional reach?

Third, there are *substantive* questions. These may be the hardest of all, as they imply competition between Congress’ bankruptcy power, on the one hand, and express or implied constitutional protections, on the other. How, for example, do we reconcile conflicts between constitutional standards governing the taking of property, due process rights to notice and a hearing, or, increasingly, the protection of religious liberty, on the one hand, and laws enacted under the Bankruptcy Clause, on the other?

These puzzles are not new. Indeed, the challenges of regulating financial distress preceded and informed the framing era. In the vast majority of cases since then, our approach has been to side with the bankruptcy power, and against any constitutional rule, standard, norm, or value that may constrict it. While there are obviously going to be limits to the bankruptcy power, beginning with *Sturges v. Crowninshield* we have long assumed that those limits are quite broad.¹⁵ With only one exception, *Railway Labor Executives’ Ass’n v. Gibbons*,¹⁶ the Court appears never to have struck down legislation on the grounds that it exceeded Congress’ power under the Bankruptcy

12 U.S. CONST. art. I, § 8, cl. 18 (giving Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”).

13 U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall made in Pursuance thereof . . . shall be the supreme Law of the Land . . .”).

14 See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819) (“The peculiar terms of the grant certainly deserve notice.”).

15 See *id.*

16 455 U.S. 457 (1982).

Clause. Only rarely has the Court struck down bankruptcy legislation on other constitutional grounds.¹⁷

Yet, determining the breadth and depth of this power has taken on new urgency in the wake of three recent developments. First, in 2006, the Supreme Court gave the Bankruptcy Clause an extraordinarily broad interpretation in *Central Virginia Community College v. Katz*,¹⁸ a controversial 5–4 decision which held that the states waived immunity from bankruptcy court jurisdiction by having ratified the Bankruptcy Clause.¹⁹ Second, in 2005, Congress enacted and President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), which amended the Bankruptcy Code in controversial and significant ways.²⁰ Those unhappy with the amendments have already begun to challenge their constitutionality.²¹ Third, Catholic dioceses, buckling under crushing debts created by priests' sexual misconduct, continue to commence Chapter 11 bankruptcy cases, which create serious questions about the relationship between the Bankruptcy Clause and the Religion Clauses of the First Amendment.²²

Because we have not looked holistically at bankruptcy as a constitutional problem, this Article does not purport to provide definitive answers to these or similar questions.²³ The best we can do at this

17 See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (striking down the jurisdictional grant of the 1978 Bankruptcy Act as violative of Article III); *Ashton v. Cameron City Water Improvement Dist. No. One*, 298 U.S. 513, 532 (1936) (striking down a municipal bankruptcy law as an impermissible encroachment on state power); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601–02 (1935) (holding that the Frazier-Lemke Act violated the Fifth Amendment's Takings Clause). The vast majority of Supreme Court decisions on bankruptcy consider not the constitutionality of bankruptcy legislation, but instead construction of the operative statutes.

18 546 U.S. 356 (2006).

19 *Id.* at 377–78.

20 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (to be codified as amended in scattered sections of 11, 12, 18, 28 U.S.C.). The current version of the Bankruptcy Code was originally enacted in 1978, see Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, and has been amended several times.

21 See, e.g., *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 761 (D. Minn. 2006) (involving a constitutional challenge to BAPCPA); *Hersh v. United States*, 347 B.R. 19, 21 (N.D. Tex. 2006) (same). These and other cases asserting the unconstitutionality of certain features of BAPCPA are discussed *supra* Part VI.A.

22 See *infra* Part IV.C. See generally Lipson, *Churches*, *supra* note 6 (exploring the doctrinal and constitutional dilemmas posed by the bankruptcies of several Catholic dioceses).

23 Indeed, this Article is just the first step in that much larger project.

point is to identify a theme in the treatment of these questions and to make some suggestions about how to address this theme. The theme that emerges from a broader analysis of constitutional problems in bankruptcy is "*bankruptcy exceptionalism*." Bankruptcy exceptionalism has been an operating principle in the creation and development of the bankruptcy power since the Framing. It has several distinct, but related, meanings which help to explain some of the puzzles noted above.

For example, exceptionalism fills in some pieces of the organic puzzle. The Framers may have constitutionalized bankruptcy not to create permanent bankruptcy law, but only to enable Congress to respond to extraordinary—that is, exceptional—circumstances, such as financial busts. Exceptionalism also describes how we have addressed (although perhaps not solved) some of the structural puzzles noted above. For example, bankruptcy jurisdiction appears to be exceptionally broad vis-à-vis the states, and exceptionally complex vis-à-vis other components of the federal government. Similarly, bankruptcy appears to result in exceptions to conventional notions about the treatment of a variety of constitutional protections involving, among others, property, due process, and religious liberty. This may explain why bankruptcy is, to some, "just special" as a constitutional matter.²⁴

To say that bankruptcy often generates constitutional anomalies is not, however, to say that it should. Exceptionalism's broader implication is troubling. Many have observed that our Constitution—and perhaps our nation—are "exceptional."²⁵ This might be benign, in

24 See Richard Leib, *State Sovereign Immunity: Bankruptcy Is Special*, 14 AM. BANKR. INST. L. REV. 201, 203 (2006).

25 See Osmar J. Benvenuto, Note, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 74 FORDHAM L. REV. 2695, 2736–37 (2006) (collecting and discussing authorities on exceptionalism). "Exceptionalism" is often associated with claims about national identity. It is "[t]he idea that America occupies a place in history significantly different from that of any other country in the world." Dorothy Ross, *American Exceptionalism*, in A COMPANION TO AMERICAN THOUGHT 22, 22 (Richard Wightman Fox & James T. Kloppenberg eds., 1995). Exceptionalism is thought to be a product of an alleged absence of a feudal past, a strong preference for individual rights and nongovernmental association, and/or the breadth and wealth (at least for a time) of the frontier. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 36 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. Chi. Press 2000). Although sometimes considered a pejorative term, it has features that some see as positive. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1487 (2003) ("Looking only at [negative aspects of American exceptionalism] obscures the most important respect in which the United States has been genuinely exceptional, with regard to international affairs, international law, and promotion of human rights: namely, in its exceptional global leadership and activism.").

the same way that we say that all the children of Lake Wobegon are above average. But it might also be unprincipled. If we are exceptional, the reasoning goes, then we are unique. And, if we are unique, we need not be governed by others'—or even our own—rules.²⁶ To say that bankruptcy is exceptional recognizes the potential for a kind of constitutional ad hocery that many would find disturbing.

Thus, the important questions will require us to explain why we have tolerated this exceptionalism in bankruptcy, whether it is a good thing, and how far it should go. A constitutional theory of bankruptcy should answer these questions by defining the breadth and depth of the bankruptcy power in relation to other constitutional rules, standards, norms, and values. Although no single article can do this, this Article does suggest two things that a tractable constitutional theory of bankruptcy should account for.

First, if bankruptcy produces exceptional constitutional results, it may be due in part to its unique location on the public-private continuum. We have come to view bankruptcy as a problem of "private" rights—that is, rights at property, contract, and tort, which typically arise under state law and which, for convenience, I will call "state private law." But this has distracted us from bankruptcy's uniquely complex mix of public and private rights and responsibilities. Bankruptcy constitutes a significantly public mechanism for the creation and destruction of a whole host of private rights, including those that are creatures of state private law. Indeed, its greatest power—the discharge of debt—can be seen as the conversion of a private right (a debt claim) into a public one (a permanent injunction against its collection).

The public reach of the bankruptcy power is at once the most difficult and the most important question we can address when considering the constitutional dimensions of bankruptcy. So far as the Supreme Court is concerned, the "core" of the bankruptcy power is the "restructuring of debtor-creditor relations."²⁷ The problem with this is that most relationships can be reduced to debtor and creditor, and "restructuring" implies too many degrees of freedom. Virtually anything *could* be justified as within the power to restructure debtor-creditor relations, and that obviously is not acceptable.

While reasonable minds can differ on the constitutive elements of the bankruptcy power, and thus what is within and without its scope,

²⁶ See generally Koh, *supra* note 25, at 1480–87 (cataloguing the negative aspects of exceptionalism).

²⁷ N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (plurality opinion).

for purposes of this Article, I will suggest four²⁸: (1) the power to halt intercreditor disputes over a debtor's assets; (2) the power to collect and distribute a debtor's assets; (3) the power to punish misconduct by debtors, creditors, or others who harm creditors by, for example, hiding a debtor's assets; and (4) the power to reward the "honest but unfortunate" debtor²⁹ with a discharge of debt. This last power is the most controversial, for it penetrates most deeply into privately ordered relations. It implies that we have, in the bankruptcy power, constitutionally sanctioned the violation of rights arising—and otherwise enforceable—at state private law.

These public powers should not go unchecked. Thus, a second major goal of this Article is to identify constitutional rules, standards, norms, and values that constrain these powers. In particular, the Article identifies certain democratic and counter-majoritarian protections that have been built into bankruptcy as it is practiced. Thus, while judicial decisionmaking is obviously not democratic, certain key features of the bankruptcy process—for example, the election of Chapter 7³⁰ and Chapter 11³¹ trustees—depend on rightsholder (e.g., creditor) voting. We may tolerate some of the economic violence done by bankruptcy because it is supported by a democratic infra-

28 This list builds on, among other things, the taxonomy proposed by Louis Levinthal. See Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 225 (1918) ("All bankruptcy law . . . no matter when or where devised and enacted, has at least two general objects in view. . . . [It] seeks to protect the creditors, first, from one another and, secondly, from their debtor. A third object, the protection of the honest debtor from his creditors, by means of the discharge, is sought to be attained in some of the systems of bankruptcy, but this is by no means a fundamental feature of the law."). A somewhat similar taxonomy of colonial bankruptcy laws appears in PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA* 12–13 (1974).

29 This character is often associated with language in *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934): "[The bankruptcy law] gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preëxisting debt." *Id.* at 244. As discussed below, this hypothetical character has been around for some time. Blackstone explained that England's bankruptcy law would not "confine an honest bankrupt after his effects [were] delivered up" to creditors. WILLIAM BLACKSTONE, 2 COMMENTARIES *473. As Harrison Gray Otis, an important member of the Federalist party and early United States Representative, stated in 1799 debates about proposed bankruptcy legislation: "[W]e should give to creditors a control over the property of their debtors, so as to stop the fraudulent in their career, and we should rescue the honest but unfortunate insolvent from the oppression of a vindictive creditor.'" See MANN, *supra* note 1, at 212 (quoting 9 ANNALS OF CONG. 2675 (1799) (statement of Rep. Otis)). As developed in Parts II and V, below, I believe this character's normative contours are central to understanding the reach of the bankruptcy power.

30 11 U.S.C. § 702 (2000).

31 *Id.* § 1104(b)(1).

structure. Conversely, bankruptcy has also developed important counter-majoritarian creditor protections, including protections for priorities established under state private law.

What is at stake here? We have already seen constitutional challenges to BAPCPA, the 2005 amendments to the Bankruptcy Code. In the longer term, we can easily imagine Congress tempted to further amend the Bankruptcy Code to provide relief for those caught in the subprime mortgage lending "bubble."³² There are also likely to be more religious entities seeking bankruptcy relief.³³ These, and many other legal responses to financial distress, present important and underappreciated challenges to constitutional ordering.³⁴

32 This may already be in process. According to a recent *New York Times* article, Illinois Senator Richard Durbin, the Democratic Whip, plans to propose amendments to the Bankruptcy Code in a bill called the Helping Families Avoid Foreclosure Act, that would, among other things, permit writing down loans and stretching out payment terms. See Steve Lohr, *Loan by Loan, the Making of a Credit Squeeze*, N.Y. TIMES, Aug. 19, 2007, § 3, at 7.

33 As of this writing, the most recent diocese to declare bankruptcy is that of San Diego, California. See Greg Moran, *Complex Legal Issues Will Accompany Filing*, SAN DIEGO UNION-TRIB., Feb. 28, 2007, at A1.

34 The full list of other constitutional issues that might be raised by bankruptcy is too long to recite. It would, however, include questions about the right to a jury trial in bankruptcy, see *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 64–65 (1989) (holding that the jury trial right is preserved for a fraudulent conveyance defendant who has not filed a proof of claim); First Amendment protections for political or media debtors, see, e.g., 1992 Republican Senate-House Dinner Comm. v. Carolina's Pride Seafood, Inc., 858 F. Supp. 243, 246–47 (D.D.C. 1994) (holding that the First Amendment is not a defense to a constructive fraudulent conveyance claim), *vacated*, 158 F.R.D. 223 (D.D.C. 1994); and the prohibition on debt peonage, see *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (observing that the Thirteenth Amendment prohibits all kinds of "slavery," including performing labor in payment of a debt). Moreover, debt has played an unusually important role in many constitutional decisions, from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 331–32 (1819) (establishing congressional power to create a national bank), to *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283–84 (1856) (setting forth important parameters of the judicial power), to *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842) (holding that a dispute about the effect of cancellation of indebtedness would be resolved not by state law, but instead by the one "just" rule of consideration applicable to all commercial cases in federal courts). Indeed, managing debt-related disputes has often been a critical component of the work of the Supreme Court. The Supreme Court established the "common law" of negotiability, see *Mandeville v. Joseph Riddle & Co.*, 5 U.S. (1 Cranch) 290, 295–97 (1803), and the greatest bulk of its work in the mid-nineteenth century involved questions about the enforceability of municipal bonds issued to finance the growth of the railroads. See 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION pt. I, at 920 (1971) ("Probably no question in American jurisprudence has been more persistently and thoroughly litigated than the validity of municipal bonds in aid of rail-

This Article proceeds as follows: Part I explains why existing bankruptcy theory does not adequately address constitutional problems in bankruptcy and the work that a constitutional theory of bankruptcy can—and cannot—do. Parts II–IV describe the organic, structural, and substantive puzzles and exceptionalism that permeate the constitutional problems of bankruptcy. Part V offers thoughts on what an effective constitutional theory of bankruptcy should account for. Part VI concludes by considering what is really at stake in certain present or developing controversies, and how the foregoing discussion can enrich our understanding of these difficult problems—in the process pointing us to better solutions.

I. WHY A CONSTITUTIONAL THEORY OF BANKRUPTCY?

Why have a constitutional theory of bankruptcy? Its presence in the Constitution alone—although odd—is not itself grounds to develop a theory. After all, the Constitution gives Congress the enumerated power to “grant Letters of Marque and Reprisal,”³⁵ and forbids it from granting titles of nobility.³⁶ We appear to have survived without broad constitutional theories of those or other similarly trivial features of the Constitution.³⁷ Nor is it obvious why bankruptcy problems are sufficiently important to warrant deeper constitutional theorizing. Laurence Tribe, in what is perhaps our definitive treatise

roads.” (quoting JAMES A. BURHANS, *THE LAW OF MUNICIPAL BONDS* 19 (Chi. & N.Y., S.A. Kean & Co. 1889))). The problems of debt and democracy go well beyond those of bankruptcy alone, although these and other related issues exceed the scope of this Article.

35 U.S. CONST. art. I, § 8, cl. 11. This provision has received occasional attention as it relates to Congress’ power to declare war. See Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1040 (1986) (arguing that the Constitution requires that paramilitary activities abroad be undertaken only with congressional authorization pursuant to the Marque and Reprisal Clause); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 696 (1972); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1618 (2002) (arguing that the Clause only refers to “the specific measure of forcible seizure of foreign property in redress of a prior wrong”).

36 U.S. CONST. art. I, § 9, cl. 8; *id.* art. I, § 10, cl. 1. Richard Delgado has argued for a revival of the Antinobility Clauses as a way to remedy injuries that are not reached under the Equal Protection Clause. See Richard Delgado, *Inequality “From the Top”: Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100, 102 (1984). Christopher Eisgruber uses the Clauses in a different way, arguing that they exemplify a general constitutional principle: prohibiting government authority from creating “caste-based factions.” See Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1302 (1994).

37 For a discussion of constitutional inanities, see J.M. Balkin, *The Constitution as a Box of Chocolates*, 12 CONST. COMMENT. 147 (1995).

on the Constitution, devotes two paragraphs to the subject—out of 1381 pages of text.³⁸ Moreover, there are plenty of other important federal subjects—for example, antitrust, internal revenue, securities regulation, and intellectual property—for which we have not generated broad constitutional theories.³⁹ What, if anything, makes bankruptcy special?

Two things. First, from the Framing, bankruptcy has presented a number of puzzles. Questions involving the breadth and depth of the bankruptcy power approach the core of the Constitution's capacity to affect private ordering. These questions will likely grow more urgent as the systems in which the power operates become more complex.

38 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 5–8, at 846–48 (3d ed. 2000). Of the scores of serious constitutional scholars who populate United States law schools, only one, Erwin Chemerinsky, appears to have devoted any significant energy to understanding the constitutional dynamics of bankruptcy. See Erwin Chemerinsky, *Decision-Makers: In Defense Of Courts*, 71 AM. BANKR. L.J. 109, 124–30 (1997) [hereinafter Chemerinsky, *Courts*] (discussing the practical and jurisdictional implications of bankruptcy courts being Article I as opposed to Article III courts); Erwin Chemerinsky, *Ending the Marathon: It Is Time To Overrule Northern Pipeline*, 65 AM. BANKR. L.J. 311, 311–17 (1991) [hereinafter Chemerinsky, *Marathon*] (arguing in part that the “Constitution should not be interpreted as forbidding Article I bankruptcy courts from hearing state claims”). See generally Chemerinsky, *supra* note 6 (analyzing constitutional questions relating to BAPCPA). Some others discuss bankruptcy in passing, usually as it relates to questions of state sovereign immunity, see Kathleen M. Sullivan, *From States’ Rights Blues to Blue States’ Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799, 805 (2006) (discussing *Katz* as a circumvention of earlier decisions), or the relationship between Article I and Article III powers, see, e.g., Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 933 (1988); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 672–89 (2004) (distinguishing Article I “tribunals” from Article III “courts”). These latter works usually recruit bankruptcy to address other constitutional questions, and do not engage bankruptcy or broader questions of financial distress in any systematic way.

39 There are, of course, many thoughtful discussions of the constitutional implications of the regulatory effectuation of these and many other enumerated federal powers. See, e.g., Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: “Constitutionalizing” the Internal Revenue Code*, 82 YALE L.J. 51, 52 (1972) (discussing the tax-exempt status and the allowable charitable deduction for fraternal orders and social clubs that discriminate on the basis of race, religion, nationality, sex, and political affiliation); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis 1880–1918*, 50 OHIO ST. L.J. 257, 277–81 (1989) (discussing antitrust law in terms of late nineteenth- and early twentieth-century laissez-faire constitutionalism); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004); Symposium, *The First Amendment and Federal Securities Regulations*, 20 CONN. L. REV. 261 (1988). My claim is not that these other fields lack constitutional analysis. Rather, it is to focus attention on the underappreciated constitutional problems that bankruptcy creates.

Second, existing bankruptcy theory has not defined the parameters of this power, and thus has not seriously engaged these puzzles. Rather, the dominant debates in bankruptcy literature for the past several generations have been normative and concerned chiefly with bankruptcy as a problem of private ordering.

This Part has two goals. First, it summarizes this literature, which can be seen as forming a continuum. At one end are those who tend to view bankruptcy as a set of federal procedures wrapped around—and limited by—a state private law core. At the other end are those who view bankruptcy as involving a much broader set of legislative powers and possibilities.⁴⁰ Second, and more generally, this Part describes what a constitutional theory can—and cannot—do for bankruptcy.

A. *The Bankruptcy Theory Continuum*

Bankruptcy theory is informed by a rich and lively literature debating the proper normative goals of bankruptcy policy. At one end of the spectrum are proceduralists, who argue, in essence, that bankruptcy law should be viewed as a process that sorts out nonbankruptcy entitlements, which are largely creatures of state private law.⁴¹ This position is chiefly associated with Thomas Jackson's 1982 article on the so-called "creditors' bargain," in which he argued that the appropriate way to view the bankruptcy system was from the perspective of the deal that creditors would have chosen for themselves had they been in a position to do so before the debtor's bankruptcy.⁴² Thus, "bankruptcy law should make a fundamental decision to honor

40 Whether bankruptcy theory more accurately forms a "continuum" or a set of "camps" is open to debate. Professor Baird has noted that bankruptcy theoreticians can be clustered into two groups, "traditionalists" and "proceduralists." See Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 576–77 (1998) ("[T]here are two distinct camps. In the first are traditional bankruptcy lawyers and scholars whose views are largely reflected in the recent report of the National Bankruptcy Review Commission. . . . The [second] group's distinctive characteristic is its focus on procedure . . ."). I prefer to characterize the debate as a continuum for a variety of reasons, including that there are many subtle differences among writers about their normative aspirations for bankruptcy. With few exceptions, however, those writing on this continuum appear reluctant to engage seriously the constitutional dimensions of their positions, whatever they may be.

41 See *id.* ("The second group [in the bankruptcy policy debates] consists almost entirely of academics The group's distinctive characteristic is its focus on procedure and its belief that a coherent bankruptcy law must recognize how it fits into both the rest of the legal system and a vibrant market economy.").

42 Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982).

negotiated non-bankruptcy entitlements.”⁴³ Bankruptcy law should be viewed chiefly as a procedural mechanism for solving the collective action problem that arises upon insolvency. Bankruptcy law, on the proceduralist model, does not say who should bear the loss. That question will be answered by other—chiefly state—law.

Proceduralists have tended to avoid the constitutional dimensions of their position. For example, Douglas Baird, in questioning the wisdom of the Supreme Court’s controversial decisions in the *Northern Pipeline*⁴⁴ and *Gibbons*⁴⁵ cases, concluded that the defects ultimately were normative, not constitutional.⁴⁶ The “greatest concern [of bankruptcy law],” he argued, “is that the procedure by which state-created rights are recognized is fair.”⁴⁷ This was not a constitutional mandate, however. “Although the creation of some substantive rights may be within the scope of Congress’ power, they turn away from the central purpose of bankruptcy law, a purpose that is served, in the first instance, by creating procedural rules rather than substantive rights.”⁴⁸ The important question for most proceduralists is not whether Congress has power under the Bankruptcy Clause, but what should be done with it.

Professor Mooney has recently advanced the proceduralist project by explicitly characterizing it as a species of civil procedure, and therefore identifying it with some of the constitutional trappings of our procedural system.⁴⁹ If, as this model holds, losses are to be determined by state private law, then just as *Erie Railroad Co. v. Tompkins*⁵⁰ stripped United States district courts of the power to “make” federal common law when sitting in diversity,⁵¹ so too should bankruptcy

43 *Id.* at 871. An “enhanced” version of the creditors’ bargain model, which attempted to respond to some of its critics, appears in Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors’ Bargain*, 75 VA. L. REV. 155 (1989).

44 *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (striking down the jurisdictional grant of the 1978 Bankruptcy Act); *see infra* Part III.B.

45 *Ry. Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457, 473 (1982) (striking down the Rock Island Railroad Transition and Employee Assistance Act); *see infra* Part V.B.

46 *See* Baird, *Bankruptcy Procedure*, *supra* note 6, at 45.

47 *Id.* at 47.

48 *Id.*

49 Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 934 (2004).

50 304 U.S. 64 (1938) (holding that federal courts must apply state law as determined by the state’s highest court in diversity actions).

51 *Id.* at 78–80.

courts be constrained from “making” law where Congress was without power to act.⁵² Mooney is obviously focused chiefly on cases where a bankruptcy court might wish to make interstitial law, arguing that this should be impermissible on a variety of normative grounds. But he suggests by analogy that the Bankruptcy Clause does not empower Congress to trump much of state private law.⁵³

Although not overtly a proceduralist, Professor Plank has argued that analogous constraints apply to the bankruptcy power, rooted in historical analysis of the Bankruptcy Clause. He has argued that the Bankruptcy Clause only empowers Congress to “regulate[] the relationship between an insolvent debtor and her creditors.”⁵⁴ This in turn implies two constraints: first, that a debtor be “insolvent” in some sense, and second that “the law may not create direct entitlements or liabilities for parties other than debtors and their creditors.”⁵⁵ Thus, according to Professor Plank, Congress may not use the Bankruptcy Clause to regulate debtor-creditor relations generally, to give creditors rights not available at state private law, or to diminish rights of parties other than the insolvent debtor or creditors.⁵⁶ Insolvency, state private law, and the debtor-creditor relationship form the constitutional boundaries of the bankruptcy power in Professor Plank’s model.⁵⁷

52 Mooney, *supra* note 49, at 995–96 (“‘*Erie*’s declaration” meant that “‘federal courts should not, without compelling reason, displace state rules with those of their own making because Congress had not passed legislation to cover the facts of *Erie*.’” (quoting EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 177 (2000))); see also Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 644 (2004) (“[I]n the case of Congress’s Bankruptcy Power, the primary meaning of *Erie* retains significant force.”).

53 See Mooney, *supra* note 49, at 998 (“[C]odification of the *Swift* doctrine would be no more coherent and no more just than was the judge-made *Swift* doctrine itself.”).

54 See Plank, *Limits*, *supra* note 6, at 491–92.

55 *Id.* at 492.

56 Plank, *Federalism*, *supra* note 6, at 1091–92 & nn.107–12.

57 On Professor Plank’s theory, some features of the current system may be outside the scope of the bankruptcy power. For example, the Bankruptcy Code contains no requirement that a debtor be insolvent to commence a bankruptcy case, and there are famous, if rare, examples of solvent debtors seeking bankruptcy protection. See, e.g., *In re Johns-Manville Corp.*, 36 B.R. 727, 729–30 (Bankr. S.D.N.Y. 1984) (involving a debtor corporation that commenced a bankruptcy case when still solvent in order to address potential future liabilities)]. Nor does state private law generally give creditors or third parties a variety of rights available in bankruptcy. For example, state private law does not generally give creditors or third parties the right to propose or vote on a plan of reorganization, to replace a debtor’s management, or to seek a debtor’s liquidation.

The proceduralist vision has been hotly contested, from its assumptions⁵⁸ to its method and logic.⁵⁹ Yet no elegant theory has been proposed to supplant it. Rather, at the other end of the continuum, we find a loose collection of academics and practitioners who argue that bankruptcy embraces complex, "competing—and sometimes conflicting—values" and aspirations over which Congress should have the power to legislate.⁶⁰ A theme, however, is that those at this other end of the continuum would generally give Congress and bankruptcy courts greater power to adjust debtor-creditor relations than would proceduralists.

On this statist view, bankruptcy policy involves many different approaches to the basic question of how losses should be distributed. Losses may be distributed by agreement of the parties (for example, secured credit), by state law (for example, exemptions and lien laws), or by positive bankruptcy law (for example, special priorities built into the Bankruptcy Code protecting, *inter alia*, grain farmers and fishermen⁶¹). The statist position is thus that Congress has largely unrestrained power to make positive bankruptcy law, even to trample state private law, of which proceduralists would probably be much more protective.⁶² Statists would presumably permit Congress to legislate in such traditional spheres of state law as the creation of liens on personal property.⁶³

58 See, e.g., Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 827 (1985) ("[Jackson and other proponents of the creditors' bargain model] assume that every creditor—apparently including asbestos victims and other tort claimants . . .—will have full information and competent legal advice in dealing with the debtor. They assume further that every creditor will make the same assumptions they do and bring to bear their same highly skilled free market economic analysis I do not find their approach helpful . . .").

59 See generally David Gray Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341 (1987) (reviewing THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986)). Carlson strongly criticizes the creditors' bargain model on which Jackson's work heavily relies, asserting that, "at his best, Jackson rises to mere tautology. Beyond that, Jackson entangles himself in unreconciled contradictions and depends upon factual assertions that no one could accept as true." *Id.* at 1342.

60 See Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777 (1987).

61 See 11 U.S.C.A. § 507(a)(6) (West Supp. 2007).

62 David Gray Carlson early on recognized that the principles that should govern the scope of the bankruptcy power would look not to market economics but instead to federalism. Carlson, *supra* note 59, at 1348 ("Federalization of debtor-creditor law has to be justified by principles that are closer to the logic of diversity jurisdiction than to the logic of profit maximization.").

63 See, e.g., David M. Phillips, *Secured Credit and Bankruptcy: A Call for the Federalization of Personal Property Security Law*, LAW & CONTEMP. PROBS., Spring 1987, at 53, 57 (1987) ("Congress's power to pass bankruptcy legislation would, in itself, surely sup-

While the statist position would assume greater congressional authority to legislate in bankruptcy (and probably greater judicial discretion to act in the absence of positive law), it has not yet coalesced into a deeper theory of the constitutional limitations on bankruptcy. The best that scholars have been able to do is to develop important empirical insights into what actually occurs when businesses become financially distressed,⁶⁴ and to make tentative stabs at incorporating alternative theories. Professor Korobkin, for example, has urged that bankruptcy involves more than “mere property.”⁶⁵ Rather, bankruptcy “provides a forum in which competing and various interests and values accompanying financial distress may be expressed and sometimes recognized.”⁶⁶ Any number of competing values may lead a legislature to enact a federal bankruptcy law that purports to address this problem. Courts should, according to statist, have great flexibility in crafting bankruptcy rules and standards to address these values.⁶⁷

These debates have produced a rich and fascinating literature. It would not, however, appear that most of those involved in these debates have fully contemplated the constitutional implications of their policy positions. Proceduralists would tell us that Congress’ power to legislate under the Bankruptcy Clause should eschew creating or destroying “substantive” rights, which should be determined largely by state private law.⁶⁸ The problem is that the proceduralist logic breaks down when the prebankruptcy entitlements in question are provided or protected by the Constitution. What should happen in bankruptcy when state private law is shielded, altered, or enhanced

port the specific suggestion of this article to federalize personal property security law and integrate it with the Bankruptcy Code.” (footnote omitted)).

64 See, e.g., Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 677–753 (1993); Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1207–54 (2005).

65 Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 745 (1991).

66 *Id.* at 766.

67 See *id.* at 774–75.

68 This is not to say that the proceduralist logic is always consistent. Professor Jackson, for example, has famously argued in favor of the individual debtor’s right to a fresh start, which would tolerate the destruction of many state private law rights at contract, tort, and, to a lesser extent, property. See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1394 (1985). As with his *Creditors’ Bargain* article, Jackson here is not making constitutional claims, only normative ones. See *id.* at 1394 (“[N]o one thus far has developed a comprehensive normative theory of the right of discharge . . .”).

by a constitutional gloss? The Constitution may give special dignity to certain types of state private law—for example, property—or to certain types of participants—for example, religious actors or entities. When the Constitution materially affects state private law—or creates rights independent of state private law—how would a proceduralist choose?

Statists would probably tell us that Congress has much greater power to legislate under the Bankruptcy Clause, and would point to the many features of existing law that do, in fact, substantively alter state-created property and contract rights, including, most importantly, the discharge of indebtedness. But the statist position would have trouble helping us identify a stopping point. It would also have trouble selecting among competing values and norms when the competition derives from a constitutional challenge. Recognizing that bankruptcy is political does not necessarily tell judges what to do when the instrument creating the polity is the subject of the dispute.

B. What Is Constitutional Theory Good For?

There may be a simple reason why bankruptcy theory debates have largely ignored constitutional questions: they may not matter. Constitutional theory is, after all, a matter of far greater self-seriousness than bankruptcy.⁶⁹ Constitutional theory invokes images of deep thinking about the deep questions that face our nation and its distribution of rights and responsibilities. Constitutional law—and theories that might explain or determine it—are about matters of free speech, the political franchise, invidious discrimination, chattel slavery, and the proper dimensions of the organs of governance, among other things. While bankruptcy theory may have its depths, they are bounded by seemingly smaller questions of loss allocation and property distribution.

The world is in no obvious need of more constitutional theory. There is already plenty to go around. There are, among others, originalists (both “hard”⁷⁰ and “soft”⁷¹), textualists,⁷² proceduralists,⁷³

69 Robert Bork is sometimes characterized as the proponent of the idea that constitutional law must be grounded in some sort of “theory.” See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971) (arguing that “[a] persistently disturbing aspect of constitutional law is its lack of theory” and describing “the necessity for theory”).

70 Hard originalism is usually associated with the writing of Raoul Berger, Robert Bork, and Justice Scalia. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 365 (1977) (noting the “prevailing distrust of unbounded judicial interpretive discretion” during the founding era); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 352 (1990) (“Once adherence to the original understanding is weakened or abandoned, a judge, perhaps

constructivists,⁷⁴ institutionalists,⁷⁵ minimalists,⁷⁶ and perfectionists.⁷⁷ There are so many theories of the Constitution, it is not completely clear what a “constitutional theory” is actually supposed to accomplish.⁷⁸ So, what do I mean by “constitutional theory,” and what work would a constitutional theory of bankruptcy do that is not already performed either by existing theory—or by no theory at all?

I mean “theory” in the sense Lawrence Lessig does: constitutional theory should be a “tool for cutting off senseless parts, when parts of the practice become senseless [and] a tool for revealing the senseless in a practice when the senseless is otherwise unseen.”⁷⁹ Constitutional theory should not purport to produce “a general formula, or equa-

instructed by a revisionist theorist, can reach any result”); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 45 (Amy Gutmann ed., 1997) (stating that “the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution changes”).

71 See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205, 214 (1980) (describing the link between textualism and original intent and distinguishing these from “moderate” originalism as an interest in “the framers’ intent on a relatively abstract level of generality”); Cass R. Sunstein, *Five Theories on Originalism*, 19 HARV. J.L. & PUB. POL’Y 311, 313 (1996) (describing a “soft originalist” as one who “will take the Framers’ understanding to a certain level of abstraction or generality”). More recent and sophisticated versions of originalism are discussed *infra* Part II.B.2.

72 See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 16 (1980) (“[T]he most important datum bearing on what was intended is the constitutional language itself.”).

73 See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2–10 (1959).

74 See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1240–43 (1987).

75 See, e.g., ADRIEN VERMEULE, *JUDGING UNDER UNCERTAINTY* 63–85 (2006).

76 See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES* 25–30, 35–37 (2005).

77 See, e.g., JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY* 16 (2006).

78 See Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1838–39 (1997) (“In the recent past, [constitutional theory] has done too much. The language of constitutional theory is now unspeakable by practitioners of constitutional law—unspeakable both in the sense of not being understood and in the sense of not contributing to real debates about constitutional law.”). On the growing gap between theory and practice, see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 42–57 (1992).

79 Lessig, *supra* note 78, at 1838.

tion, from which we are to deduce particular cases.”⁸⁰ Rather, a constitutional theory of bankruptcy should remain “low down, near the data.”⁸¹ A constitutional theory of bankruptcy, as any other constitutional theory, can “help us to work around interpretive puzzles.”⁸² It can be “a way to make sense of our practice at particularly difficult times.”⁸³

The constitutional theory towards which I aim would help connect bankruptcy—and the constitutional problems it encounters—to other constitutional rules, standards, norms, and values. It is not a unified field theory of bankruptcy or constitutional law, but a description of what is—and should be—behind the constitutional choices bankruptcy inevitably forces us to make on occasion. Neither bankruptcy theory nor constitutional theory has yet revealed the deeper patterns and connections between the two that distinguish the sensible from the senseless. The balance of this Article is an early attempt to do so.

II. ORGANIC PUZZLES; ORGANIC EXCEPTIONALISM

Bankruptcy and the challenges of regulating financial distress have, over the years, presented three classes of constitutional puzzles: organic, structural, and substantive. Each puzzle has, to a greater or lesser degree, been addressed in what can be characterized as “exceptional” ways. This Part and the next two Parts identify these puzzles, and the exceptionalism attending each.

A. *Why a Bankruptcy Clause?*

The very presence of a bankruptcy power in the Constitution raises a host of questions: Why does our Constitution have a Bankruptcy Clause? What work would it do that some combination of the Commerce, Necessary and Proper, and Supremacy Clauses could not have accomplished? The operative terms—“uniform” and “bankruptcies”—had specific, “peculiar” meanings in the 1780s.⁸⁴ Why would

80 *Id.* at 1847; see also Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1811 (1997) (suggesting that “[m]ost constitutional theory . . . underplays the role of context”); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 426–38 (1995) (describing the “Erie effect” in which longstanding legal traditions are challenged and ultimately replaced).

81 Lessig, *supra* note 78, at 1838.

82 *Id.* at 1847.

83 *Id.*

84 *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819) (“The peculiar terms of the grant certainly deserve notice.”). Of course, by the time of *Sturges*, the

we have chosen such arguably narrow terms, with virtually no debate, especially when their accepted meaning may have presented problems for those Framers who happened to be debtors? And should Congress today be bound by this narrower construction of the bankruptcy power?

This subpart identifies puzzles in the origin of the Bankruptcy Clause, and suggests that its original understanding may be explained as a kind of exceptionalism in three different ways. First, the bankruptcy power may not have been intended to create permanent law, but only an *in terrorem* power, to deter the states, which would in the first instance make the private law that would establish debtor-creditor relations, from legislating too aggressively in favor of either debtors or creditors, or in any way that had the potential to disturb a nationwide balance of private economic ordering. Rather, the Bankruptcy Clause would create a power to be used, if at all, in exigent—that is, exceptional—circumstances. Second, our current, expanded construction of the bankruptcy power requires a deviation from—or exception to—originalist approaches to constitutional interpretation. Third, the original understanding of the bankruptcy power has been used to create an important exception to conventional ways of construing the effect of later amendments to the Constitution on earlier provisions.

1. The Puzzling Origins

As ratified, the Bankruptcy Clause provides that “Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”⁸⁵ Little is known about its legislative history.⁸⁶ It was apparently added late in the proceedings of the Constitutional Convention, “after very little debate.”⁸⁷ Charles Pinckney of South Carolina was said to be its drafter.⁸⁸ Only Connecticut voted against it.⁸⁹ It was approved along with the Full

Court concluded that the terms “bankruptcy” and “insolvency” were interchangeable. *See id.* at 140–45. It is not apparent that the Framers would have shared that view.

85 U.S. CONST. art. I, § 8, cl. 4.

86 James Olmstead devotes a single paragraph to its history. *See* James M. Olmstead, *Bankruptcy a Commercial Regulation*, 15 HARV. L. REV. 829, 831 (1902).

87 Tabb, *supra* note 10, at 13. “What prompted Pinckney to raise these new issues is unknown. There is no record of any delegate even uttering the word ‘bankruptcy’ before this.” MANN, *supra* note 1, at 183.

88 *See* Tabb, *supra* note 10, at 13.

89 Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 216–17 (1957).

Faith and Credit Clause.⁹⁰ Its purpose has often been derived from Madison's discussion in *The Federalist*:

The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states that the expediency of it seems not likely to be drawn into question.⁹¹

While Madison, in Bruce Mann's words, "skipped lightly over the clause,"⁹² there was in fact considerable confusion and concern about bankruptcy and insolvency at the time. The confusion derived from the bewildering array of colonial laws that existed at the time. Some colonies had "insolvency" laws, which would enable a debtor to be freed from debtor's prison, but which would not discharge the underlying debt obligations, the default of which led to imprisonment in the first place.⁹³ Some colonies, such as Pennsylvania, also had "bankruptcy" laws which actually enabled the debtor to discharge his debts.⁹⁴ These laws were frequently repealed, reenacted, and amended.⁹⁵ Indeed, as Peter Coleman has observed:

At the time of the Revolution, only three of the thirteen colonies—Rhode Island and the two Carolinas—had laws discharging insolvents of their debts. No two of these relief systems were alike in anything but spirit. In four of the other ten colonies, insolvency legislation was either never enacted or, if enacted, never went into effect, and in the remaining six colonies, full relief was available only for scattered, brief periods, usually on an *ad hoc* basis to named insolvents.⁹⁶

Compounding the confusing state of the law were concerns about the serious financial crises of the time.⁹⁷ These crises pitted creditors against debtors. Often, they were one and the same—meaning X may

90 See MANN, *supra* note 1, at 183.

91 THE FEDERALIST NO. 42, at 278 (James Madison) (Isaac Kramnick ed., 1987).

92 MANN, *supra* note 1, at 187. Justice Story observed in the 1830s that "[t]he brevity[] with which this subject is treated by the Federalist is quite remarkable." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1105, at 47 (photo. reprint 1994) (Melville M. Bigelow ed., Boston, Little, Brown, & Co. 5th ed. 1891).

93 See MANN, *supra* note 1, at 80.

94 See *id.* at 177–78 ("The Pennsylvania statute was a true bankruptcy act. It offered the holy grail of debt relief—a discharge of unpaid debts—but only to commercial debtors.").

95 See, e.g., *id.* at 179 ("New York . . . changed its insolvency system with breathtaking frequency . . .").

96 COLEMAN, *supra* note 28, at 14.

97 See MANN, *supra* note 1, at 176 ("Alongside the 'spirit of speculation' in the 1780s was a renewed acquaintance with failure.").

have been both a creditor of *Y* and a debtor of *Z*. *Z*'s ability to collect might thus ultimately depend on *Y*'s ability to pay *X*, even though *Y* and *Z* had no direct relationship whatsoever.⁹⁸ Even in this relatively simple time, debt created long and complex chains of relationships. Making matters worse, many of the era's major debtors were also leaders in the Revolution or Framers of the Constitution. Robert Morris of Philadelphia was the "Superintendent of Finance" during the Revolution,⁹⁹ a signatory to the Constitution,¹⁰⁰ and one of the nation's wealthiest speculators thereafter, until his bubble burst and he was locked up in Philadelphia's Prune Street Debtors' Prison in 1798.¹⁰¹ So, too, with James Wilson, "whose extensive speculations had been a continuing distraction from his duties as an associate justice" of the Supreme Court.¹⁰² He spent two weeks in debtors' prison in December 1796.¹⁰³

These confusions and concerns may explain why the Framers would have wanted the power to create a nationwide law on financial distress. But they do not necessarily explain why we have the *Clause*, why it took its particular form, or why there was so little discussion of it. The presence of the Clause is puzzling if we believe that the Constitution already contained language sufficient to give Congress the power to enact laws that would discharge debts on a uniform, nationwide basis. This may well have been the case.¹⁰⁴ There is, for example, some support for the idea that "commerce" as originally

98 See *id.* at 188.

99 See JAMES J. KIRSCHKE, *GOUVERNEUR MORRIS* 120 (2005).

100 See Frederick P. Corbit, *The Founding Fathers' Influence on Bankruptcy Law*, AM. BANKR. INST. J., July/Aug. 2007, at 50, 51.

101 See MANN, *supra* note 1, at 28. More than \$3 million in claims were "proved" against Morris in the bankruptcy case that was ultimately commenced against him. *Id.* at 253. But his bankruptcy estate was "'so entangled and mortgaged . . . that it [was] the general opinion there [would] not be one penny in the pound.'" *Id.*

102 *Id.* at 202.

103 *Id.*

104 See *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 111 (1989) (Marshall, J., dissenting) ("I see no reason to treat Congress' power under the Bankruptcy Clause any differently [than the Commerce Clause], for both constitutional provisions give Congress plenary power over national economic activity."); *Sacred Heart Hosp. of Norristown v. Pennsylvania* (*In re Sacred Heart Hosp. of Norristown*), 133 F.3d 237, 243 (3d Cir. 1998) (observing that both the Bankruptcy Clause and Commerce Clause grant Congress "'plenary power over national economic activity'" (quoting *Hoffman*, 492 U.S. at 111)). But see Plank, *Limits*, *supra* note 6, at 491–92 n.17 ("If . . . the Framers truly intended the Commerce Clause to authorize any legislation that 'affected' interstate commerce or that enhanced the national economic well being, there would have been no need for the Bankruptcy Clause.").

understood included bankruptcy.¹⁰⁵ If Madison was correct, and bankruptcy was so “intimately connected with the regulation of commerce,” why did the Commerce Clause not do the job? Similarly, if the Necessary and Proper Clause by itself could vest Congress with the implied power to create a national bank,¹⁰⁶ it would be reasonable to imagine that it could achieve the Framers’ (probably limited) bankruptcy goals.

Nevertheless, the Clause was added, with its operative terms “uniform” and “bankruptcies.” The latter is more important for present purposes, because, as suggested above, “bankruptcy” laws were different from “insolvency” laws, even if both dealt with financial distress.¹⁰⁷ The use of the term “bankruptcy” has suggested to many that the Framers had in mind the English bankruptcy system and its constraints.¹⁰⁸ But those constraints gave it “a distinctly pro-creditor orientation.”¹⁰⁹ English bankruptcy as it existed at the time of the Framing was organized around three key factors: (1) a case could be commenced only by and for the benefit of a creditor, not a debtor;¹¹⁰ (2) only against an insolvent “trader”;¹¹¹ and (3) only if the trader was “honest but unfortunate.”¹¹² As Blackstone explained, English law would

105 See Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 17 (1999) (explaining that in the 1780s the term “commerce” “had a specific, standard meaning—to enact rules to govern all gainful activities, including subjects as diverse as trade, navigation, agriculture, manufacturing, industry, mining, fisheries, building, employment, wages, prices, banking, insurance, accounting, bankruptcy, business associations, securities, and bills of exchange.” (footnote omitted)). Of course, *United States v. Lopez*, 514 U.S. 549 (1995), teaches that the Commerce Clause does not create a “plenary police power.” See *id.* at 566 (stating that the Constitution “withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation”).

106 See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 373–74 (1819).

107 See *supra* notes 93–96 and accompanying text.

108 See, e.g., Tabb, *supra* note 10, at 6–7. Further evidence for this would come from, among other things, the fact that “each year from 1789 to 1800, advocates of national bankruptcy relief struggled to enact a measure based on English rather than American practice.” COLEMAN, *supra* note 28, at 18 (citations omitted). Presumably, if the Framers intended some other form of law, they would have used the bankruptcy power to propose and enact this other form.

109 Tabb, *supra* note 10, at 7.

110 13 Eliz., c. 7, § 1 (1510) (Eng.).

111 See *id.*; see also Tabb, *supra* note 10, at 9–10 (discussing how “bankruptcy remained an involuntary remedy to be used . . . only against debtors who were merchant traders”).

112 See *supra* note 29. Interestingly, the “dishonest” debtor was known to the English as a “politic bankrupt.” See W.J. Jones, *The Foundations of English Bankruptcy*:

allow the benefit of the laws of bankruptcy to none but actual *traders*; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes: for the law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value.¹¹³

The remedy proffered by English bankruptcy law, the discharge of debt, was available only for debtors who “in all things conform[ed]” (cooperated) with the bankruptcy process.¹¹⁴ Neither farmers nor artisans nor professionals (lawyers) could benefit from the discharge.¹¹⁵ This disparity troubled many in the Colonies, for whom “[m]erchants were as rootless and unburdened by loyalty as the promissory notes they put into circulation.”¹¹⁶

Yet, it is also possible that the Framers did not in fact want to be limited to the English model. The wide variations in colonial law, for example, suggest one of two alternative stories about the Bankruptcy Clause. On the one hand, it might be that they had in mind the more debtor-friendly forms of relief enacted by certain colonies. Of particular interest here would be South Carolina, which was the home of Charles Pinckney—again, said to be the drafter of the Clause¹¹⁷—and which was “the only colony south of Maryland to create a permanent and full system of debtor relief.”¹¹⁸ South Carolina’s bankruptcy law of 1721, for example, authorized a full discharge for debtors (in particular, those in debtors’ prison) who owed more than two pounds sterling, but whose property was worth less than five pounds.¹¹⁹ The law was later amended to cover artisans and—perhaps more impor-

Statutes and Commissions in the Early Modern Period, TRANSACTIONS AM. PHIL. SOC’Y, July 1979, at 5, 9.

113 2 BLACKSTONE, *supra* note 29, at *473.

114 4 Ann., c. 4, § 8 (1705) (Eng.) (“[A]ll and every Person and Persons so becoming bankrupt . . . who shall . . . in all things conform . . . shall be discharged from all Debts by him her or them due and owing at the time that he she or they did become Bankrupt . . .”).

115 MANN, *supra* note 1, at 167–68.

116 *Id.*

117 See *supra* note 88 and accompanying text.

118 COLEMAN, *supra* note 28, at 179.

119 *Id.* at 181.

tantly—to discharge past debts.¹²⁰ On the other hand, it is possible that the wide array of unstable laws meant that the Framers could form no consensus on the scope and meaning of the bankruptcy power.

If, as conventional wisdom has it, the Framers had in mind the English model of bankruptcy, it is puzzling: why would the Framers have chosen to constitutionalize it, knowing that it may do some (the debtors among them) no good, and perhaps real harm? Of course, we do not know, because there is no meaningful record of discussion. But this leads to another question: given the complexity and controversy surrounding financial distress at the time, why was there no discussion? How could the Framers have been so blithe about the provision, given the economic situation of the times and the circumstances of at least some of the Framers? As Mann explains:

[The] seeming nonchalance toward federalizing bankruptcy stands in sharp contrast to how large the issue of debt loomed in the 1780s—or, more precisely, the issues of debt, for the debts that cast such shadows over the decade were both public and private. Although different in origin, public and private debts were intertwined in public imagination and debate and were linked more formally by the medium of paper money.¹²¹

The question becomes all the more perplexing when we remember that the first federal bankruptcy law was not enacted until 1800, despite repeated attempts, and then lasted only until 1803, repealed two years short of its scheduled sunset date.¹²² The nation would not have another bankruptcy act until the equally ill-fated act of 1841.¹²³ If a bankruptcy power was so obviously important that it had to be in the Constitution, why could the nation not enact a durable law under it until 1898¹²⁴—109 years after ratification of the Clause?¹²⁵

120 *Id.* at 182. Ultimately, this law was thought too easily abused and was further amended in 1751 to authorize a full discharge for insolvents who obtained the consent of three-fourths of their creditors by number and value. *Id.* at 184.

121 MANN, *supra* note 1, at 169.

122 Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

123 Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614. There would be one more “temporary” bankruptcy act (of 1867) before enactment of the “permanent” legislation under which we currently operate, the Act of 1898. *See* Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

124 Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *amended by* Chandler Act, ch. 575, 52 Stat. 840 (1938), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1330 (2000 & Supp. V 2005)).

B. *Organic Exceptionalism*

1. The Exceptional and *In Terrorem* Bankruptcy Clause

The answer may be that the Framers understood the Bankruptcy Clause to serve a more subtle purpose than we currently imagine—one rooted in a kind of exceptionalism. Giving Congress the power to sweep aside state bankruptcy (and perhaps insolvency) laws was not the same thing as requiring Congress to use that power. Thus, absent federal bankruptcy legislation, the states could, and did continue to, enact bankruptcy and insolvency laws, without concerns about preemption by a kind of “dormant bankruptcy clause.”¹²⁶ If the Framers believed this would happen in the absence of federal bankruptcy law, perhaps the purpose of the Bankruptcy Clause was to act as a threat to those states that might wish to give extraordinary relief to debtors (or creditors). Perhaps this was an attempt to preempt a state law race to the bottom. A state can never be extreme in protecting debtors or creditors, the Clause might really be saying, for if it is, Congress always has the power to preempt the rogue state by imposing a uniform law.

Justice Story’s *Commentaries*, while not contemporaneous with the Framing, offer early support for this thesis. Without a federal bankruptcy power, he observed:

One state may adopt a system of general insolvency; another, a limited or temporary system; one may relieve from the obligation of contracts; another only from imprisonment; another may adopt a still more restrictive course of occasional relief; and another may refuse to act in any manner upon the subject. The laws of one state may give undue preferences to one class of creditors, as for instance, to creditors by bond, or judgment; another provide for equality of debts, and a distribution *pro rata* In short, diversities of almost infinite variety and object may be introduced into the local system, which may work gross injustice and inequality, and nourish feuds and discontents in neighboring states.¹²⁷

To prevent this competition, perhaps the Framers intended a kind of *in terrorem* bankruptcy power. It would be used, if at all, only in extreme—that is, exceptional—circumstances, but would always be

125 See Tabb, *supra* note 10, at 13–14 (“For over a century after the Constitution, . . . the Bankruptcy Clause [authority] remained largely unexercised by Congress. . . . Thus, states were free to act in bankruptcy matters for all but 16 of the first 109 years after the Constitution was ratified.”).

126 See, e.g., *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 192–97 (1819) (involving a New York bankruptcy statute passed twenty-four years after the ratification of the Constitution).

127 2 STORY, *supra* note 92, § 1107, at 49.

there, a warning to would-be outlier states. This would explain why the Framers thought it necessary to have something specific on the subject. If it were left to the oblique interstices of the Commerce and Necessary and Proper Clauses, the intended audience—the states—would not necessarily get the message. This would also explain why there was so little discussion. Would Pinckney, or any of the Framers, want to be on record stating that the Clause was added at least in part because the Framers did not trust the states—who were being asked to ratify it?¹²⁸ This would also tend to explain the spasmodic enactments and repeals of bankruptcy laws for the nation's first 109 years: it was never meant to create a permanent bankruptcy law—only exceptional ones, and that is exactly what we got.

If this is correct, it is nevertheless subject to two observations. First, it does not mean that the conventional explanation—Madison's views about federalism—is incorrect. Indeed, the *in terrorem* potential of the Bankruptcy Clause would tend to be a corollary to his claim that uniformity across states was the motivating force in ratifying it. Second, and more challenging, if the bankruptcy power was meant only to create exceptional laws to be used in exigent circumstances, then we may run into a problem of retroactivity. If the Bankruptcy Clause was intended to give Congress the power to create laws that would discharge *existing* indebtedness—as was the case with South Carolina's colonial law¹²⁹—then it would by definition have to have retroactive effect. As discussed in Part IV.A below, it is one thing to legislate bankruptcy relief prospectively; it is another to upset vested rights. While this may be what the Framers intended, it creates significant challenges to our treatment of state private law, especially property, and especially as property may be protected in the Constitution.

2. Originalist Exceptionalism

Explaining why we have the Clause is not quite the same as explaining what it means, or at least what it meant to the Framers. If, as the conventional wisdom holds, the Framers intended the English conception of bankruptcy, then they would presumably have constitutionalized its limitations. As noted above, English bankruptcy was a

128 I recognize that the meetings of the Constitutional Convention in 1787 were conducted in complete privacy. Max Farrand, *Introduction to THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at xi–xxv (Max Farrand ed., rev. ed. 1937). Moreover, all records of those meetings were sealed for more than thirty years after the Convention. See Res. 8, 15th Cong., 3 Stat. 475 (1818). According to Charles Warren, secrecy was vital to making the constitution. CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 134–39 (1937).

129 See *supra* notes 115–20 and accompanying text.

limited form of relief, available to a narrow class of debtors, and only under special circumstances—when it was in the interests of creditors.¹³⁰ Nor was this understanding jettisoned during the fragile period immediately after the Framing. The Bankruptcy Act of 1800¹³¹ was apparently “a faithful transcript of the English statutes.”¹³²

Yet, within twenty years, the Court had a different view. By 1819, Chief Justice Marshall held in *Sturges* that Congress had broad discretion to delimit the scope of the bankruptcy power, as he viewed the distinction between “bankruptcy” laws and “insolvency” laws as largely immaterial.¹³³ “Although the two systems”—bankruptcy and insolvency—“have existed apart from each other, there is such a connection between them as to render it difficult to say how far they may be blended together.”¹³⁴ In deciding that, absent federal enactment of a bankruptcy law, states could enact either, the Chief Justice also gave to Congress the power to decide broadly what sorts of laws would come within the bankruptcy power. “The bankrupt law is said to grow out of the exigencies of commerce,” the Chief Justice explained, “and to be applicable solely to traders; but it is not easy to say, who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the Legislature may exercise an extensive discretion.”¹³⁵

This transformation presents another organic puzzle: are we bound by the original, more limited, understanding today? “Originalism” has played an important role in constitutional methodology,

130 See *supra* notes 108–16 and accompanying text.

131 Ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

132 F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 124 (1919).

133 *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819). As one author explained:

The scope of a bankruptcy law, in the period in which the *Constitution* was written, was to distribute the assets of a debtor among his creditors, and to discharge him from the liability of having his future acquisitions attached at the instance of his creditors for the unsatisfied portion of his debts. An insolvency law, on the other hand, operated upon the petition of the debtor to liberate his person from prison in which he had been confined by the process of State laws for the collection of debts.

NOEL, *supra* note 132, at 96.

134 *Sturges*, 17 U.S. (4 Wheat.) at 195.

135 *Id.* Relatively recent observers support this expansive interpretation. See Frank R. Kennedy, *Bankruptcy and the Constitution*, in BLESSINGS OF LIBERTY 131, 137–38 (ALI/ABI Comm’n on Continuing Prof’l Educ. ed., 1988) (“When the variety of the provisions enacted by Congress and the frequency and range of attacks on their constitutionality are considered, it must be concluded that the courts have indeed come close to permitting Congress complete freedom in formulating and enacting bankruptcy legislation.”).

especially as its proclaimed adherents (most prominently Justice Scalia¹³⁶) have been appointed to important courts. In its primitive form, originalism's goal was to limit judges interpreting the Constitution to "establish[ing] the meaning of the Constitution[] in 1789."¹³⁷ This should be done "by examining various evidence, including not only, of course, the text of the Constitution and its overall structure, but also the contemporaneous understanding" of the constitutional provision in question.¹³⁸

Originalism has had many critics who note, among other things, that it may be inconsistent with the Framers' own intentions,¹³⁹ would subject us to the "'dead hand' of the past,"¹⁴⁰ and would impair the mechanism of stare decisis. Originalism has nevertheless "thrived like no other approach to [constitutional] interpretation"¹⁴¹ and, in the process, become a more subtle and flexible tool. Today, for example, we find Jack Balkin arguing, apparently seriously, that abortion is a right that would be protected under the "*original meaning*" of the Fourteenth Amendment.¹⁴² Douglas Ginsburg and Randy Barnett, among others, have argued that originalism would "restore" the Constitution that was "lost" by the New Deal Court.¹⁴³ Debates today surround whether originalism requires us to look to "original intent," "original meaning," or "original expected application" of the Constitution's language.

If the Framers did intend to constitutionalize the English conception of bankruptcy, few scholars would suggest that Congress should today be constrained by its limitations. Rather, most tend to agree with Professor Kennedy, who observed that bankruptcy today reflects

136 See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989) (discussing why originalism is superior to other forms of constitutional interpretation).

137 *Id.* at 852.

138 *Id.*

139 See, e.g., Brest, *supra* note 71, at 218–24; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902–21 (1985). But see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 521 (2003) (offering "some additional evidence for the proposition that originalism does not self-destruct").

140 See Randy E. Barnett, *Trumping Precedent with Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT. 257, 257 (2005) (discussing the challenges to originalism).

141 *Id.*

142 Jack M. Balkin, *Abortion and Original Meaning* 102 (Yale Law Sch., Research Paper No. 128, 2006), available at <http://ssrn.com/abstract=925558>.

143 See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 355 (2004); Douglas H. Ginsburg, *On Constitutionalism*, 2003 CATO SUP. CT. REV. 7, 16–17.

a significant departure from the original understanding.¹⁴⁴ Some, like Professor Plank, argue that bankruptcy as practiced today is in fact consistent with the understanding the Framers would have had:

Unlike more controversial provisions of the Constitution (e.g., the Commerce Clause, the Fourth Amendment, and the Fourteenth Amendment) the Bankruptcy Clause has not undergone a dramatic transformation from one interpretation to another. In my view . . . all of the presumed “expansions” of Congress’s bankruptcy acts adjudicated by the Supreme Court fall well within the original intent of the Bankruptcy Clause. Perhaps because they have become accustomed to the extensive exercise [of] a federal power limited only by the Bill of Rights, Congress . . . and the courts are not so much misinterpreting the Bankruptcy Clause as they are ignoring it.¹⁴⁵

It is possible, of course, that the Framers had in mind a broader understanding of the relief contemplated by the word “bankruptcies” in 1787 than history would seem to indicate. It is possible that they in fact anticipated a world in which bankruptcy law would be interpreted broadly, in the way envisioned by Chief Justice Marshall roughly thirty years later or our radically broader interpretation today, which makes the discharge available on a voluntary basis to a wide range of debtors.¹⁴⁶ It is possible, as discussed above, that they in fact intended something resembling one of the many forms of colonial bankruptcy or insolvency laws that came and went prior to ratification of the Constitution.¹⁴⁷ But that seems unlikely. A more plausible story is that if we take a strong form of originalism seriously, we have a problem, because bankruptcy relief today goes beyond anything the Framers likely meant or imagined.¹⁴⁸ In other words, we must make an exception for bankruptcy when it comes to the original meaning of the Bankruptcy Clause.

144 Kennedy, *supra* note 135, at 137–38.

145 Plank, *Limits*, *supra* note 6, at 494 n.25.

146 The voluntary discharge was ultimately held by Justice Catron to be within the bankruptcy power. See *In re Klein*, 14 F. Cas. 716, 718 (Catron, Circuit Justice, C.C.D. Mo. 1843) (No. 7865).

147 See *supra* notes 92–96 and accompanying text.

148 It may be for this reason that Professor Plank has taken the exceptionalist position that “the Bankruptcy Clause falls outside the debate over originalism and non-originalism in constitutional interpretation.” Plank, *Limits*, *supra* note 6, at 494–95 n.25. It is, of course, not clear why this should be so: if it is in the Constitution, and we believe ourselves bound by the Framers’ understandings, why should bankruptcy be different? There is no ready evidence that they *intended* such exceptional treatment for bankruptcy.

3. *Katz*—Selective Originalism

Despite the fact that we appear to be unconstrained by the original probable conception of the bankruptcy power, we nevertheless find the Court using arguments about the framing era selectively in aid of expanding the bankruptcy power. The most recent and prominent example of this appears in *Katz*, where the Court held—by a 5–4 majority—that a state is not immune from a suit in a bankruptcy court to avoid and recover a preferential transfer received by the state.¹⁴⁹

The *Katz* Court offered two basic grounds for its decision, both rooted in an “original” understanding of the Bankruptcy Clause. First, “[b]ankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction.”¹⁵⁰ This understanding of bankruptcy was “as true in the 18th century as it is today. Then, as now, the jurisdiction of courts adjudicating rights in the bankrupt estate included the power to issue compulsory orders to facilitate the administration and distribution of the res.”¹⁵¹ But this understanding of bankruptcy was in fact broader than jurisdiction merely over things, the Court said. When enacting the Bankruptcy Clause, “[t]he Framers would have understood that laws ‘on the subject of Bankruptcies’ included laws providing, in certain limited respects, for more than simple adjudications of rights in the res.”¹⁵² This included the “power to issue ancillary orders” which effectively gave them the power to “‘pursue any *legal* method of recovering [the debtor’s] property so vested in them.’”¹⁵³

Second, the majority reasoned that the states must have consented to jurisdiction to suit in federal bankruptcy courts by ratification of the Constitution.¹⁵⁴ This consent derived from the concerns and confusions discussed above emanating from wide disparities in colonial and state laws on financial distress. According to the majority, the “ineluctable conclusion”¹⁵⁵ from these concerns about uniformity meant that the “States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to ‘Laws on the subject of Bankrupt-

149 Cent. Va. Cmty. Coll. v. *Katz*, 546 U.S. 356, 373–78 (2006). The Eleventh Amendment precludes suits “in law or equity, commenced or prosecuted against one of the United States by Citizens of another State.” U.S. CONST. amend. XI.

150 *Katz*, 546 U.S. at 369.

151 *Id.* at 362.

152 *Id.* at 370 (quoting U.S. CONST. art. I, § 8, cl. 4).

153 *Id.* (alteration in original) (quoting 2 BLACKSTONE, *supra* note 29, at *486).

154 *See id.* at 377.

155 *Id.*

cies.’”¹⁵⁶ The “scope of this consent” was, according to the majority, “limited . . . [to] bankruptcy proceedings . . . *in rem*—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction.”¹⁵⁷

There has been no shortage of criticism of *Katz*. Martin Redish and Daniel Greenfield characterize it as “unprincipled.”¹⁵⁸ Professor Plank says that “the [*Katz*] Court’s historical and logical analysis is manifestly deficient.”¹⁵⁹ Ralph Brubaker notes that “[t]hose concerned with the consistency and coherence of bankruptcy and constitutional jurisprudence . . . will find no comfort in the *Katz* decision.”¹⁶⁰

The selective use of framing-era history in *Katz* indicates a third form of organic exceptionalism: ordinarily, amendments to the Constitution are viewed as constraints on earlier passages.¹⁶¹ Thus, the Eleventh Amendment—whatever it may mean—would be understood to constrain or condition that which preceded it, including provisions of Article I. Yet, *Katz* tells us the opposite: the Bankruptcy Clause implies the apparent power to defeat (take exception to) later amendments to the Constitution.

III. STRUCTURAL PUZZLES; STRUCTURAL EXCEPTIONALISM

The preceding Part suggested that the bankruptcy power may have been rooted in a kind of exceptionalism, and may thus challenge originalist theory and conventional constructions of the Constitution. A second class of constitutional puzzles involves bankruptcy’s fit within the structure of the Constitution.

Bankruptcy presents vertical and horizontal puzzles, and our responses to both indicate exceptional treatment of constitutional rules, standards, norms, and values in the presence of bankruptcy. In the case of vertical relations, bankruptcy appears to be an exception

156 *Id.* (quoting U.S. CONST. art. I, § 8, cl. 4).

157 *Id.* at 378.

158 Martin H. Redish & Daniel M. Greenfield, *Bankruptcy, Sovereign Immunity and the Dilemma of Principled Decision Making: The Curious Case of Central Virginia Community College v. Katz*, 15 AM. BANKR. INST. L. REV. 13, 48 (2007).

159 Thomas E. Plank, *State Sovereignty in Bankruptcy After Katz*, 15 AM. BANKR. INST. L. REV. 59, 60 (2007).

160 Ralph Brubaker, *Explaining Katz’s New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 AM. BANKR. INST. L. REV. 95, 97 (2007).

161 See Redish & Greenfield, *supra* note 158, at 17 (“When interpretation of an amendment is in play, differences between powers granted in the original document in terms of text, history or Framers’ intent are rendered irrelevant.”).

to the Rehnquist Court's robust protection for states from federal judicial power. In the case of horizontal relations, bankruptcy appears to be exceptional both in the mix of functions it locates in courts, and in the relations it permits and requires between Article III and Article I courts.

A. *Vertical Relations*

Katz is the latest in a series of bankruptcy decisions involving state sovereign immunity which, in turn, form links in the much more complex chain of adjustments to state-federal relations of the past ten years or so. From the New Deal until the 1996 *Seminole Tribe* decision,¹⁶² the Court grew increasingly tolerant of Congressional attempts to give private citizens the power to sue states in federal court.¹⁶³ In *Seminole Tribe*, however, the Supreme Court held that Congress could not require states to submit to a federal court's order for mediation under the Indian Gaming Regulatory Act (IGRA),¹⁶⁴ which was enacted pursuant to the Indian Commerce Clause.¹⁶⁵ The *Seminole Tribe* majority reasoned that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."¹⁶⁶ Because the *Seminole Tribe* Court believed that "[i]t is

162 *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

163 See, e.g., *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990); *Dellmuth v. Muth*, 491 U.S. 223, 227-29 & n.2 (1989); *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472-74 (1987) (plurality opinion); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 237-38 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97-100 (1984); *Cory v. White*, 457 U.S. 85, 90 (1982); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 280 (1973); *United States v. Mississippi*, 380 U.S. 128, 140 (1965); *Parden v. Terminal Ry.*, 377 U.S. 184, 186 (1964), *overruled by Welch*, 483 U.S. 468, and *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Ga. R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 n.13 (1952); *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945), *overruled by Lapidus v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944). In a "sharp break with the past," *Seminole Tribe* effectively overruled these cases. See *Seminole Tribe*, 517 U.S. at 77 (Stevens, J., dissenting).

164 Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C.A. §§ 2701-2721 (West 2001 & Supp. 2007)). *Seminole Tribe* specifically held the Act unconstitutional. See *Seminole Tribe*, 517 U.S. at 76.

165 See *Seminole Tribe*, 517 U.S. at 52; see also U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate Commerce . . . with the Indian tribes").

166 *Seminole Tribe*, 517 U.S. at 72-73.

inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,'"¹⁶⁷ *Seminole Tribe* has been construed to mean that "a federal statute supported by only an Article I power cannot abrogate the state's sovereign immunity."¹⁶⁸

Justice Stevens dissented in *Seminole Tribe*, arguing that its rule would impair the application of federal laws, such as the Bankruptcy Code, to the states. "The majority's opinion," he stated, "prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy."¹⁶⁹ Because, under the Supremacy Clause, "federal courts have exclusive jurisdiction over cases arising under these federal laws," Justice Stevens reasoned that "the majority's conclusion that the Eleventh Amendment shields States from being sued under them in federal court suggests that persons harmed by state violations of federal copyright, bankruptcy, and antitrust laws have no remedy."¹⁷⁰

Seminole Tribe was not an aberration. In *Alden v. Maine*,¹⁷¹ the Court concluded that the common law nature of state sovereign immunity protects states from federal claims in state courts as well as federal courts.¹⁷² State courts therefore should no longer be a forum in which a debtor could seek to enforce a bankruptcy court order discharging or subordinating a state claim. Nor could Congress use its remedial powers under Section 5 of the Fourteenth Amendment to defeat sovereign immunity. In *City of Boerne v. Flores*,¹⁷³ the Court restricted Congress' power under Section 5 and required Congress to show that laws subjecting states to suit are congruent with, and proportional to, the identified harm.¹⁷⁴ This restrictive view of Section 5 foiled congressional attempts to abrogate state immunity from suit in

167 *Id.* at 54 (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)).

168 Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 802 (1998).

169 *Seminole Tribe*, 517 U.S. at 77 (Stevens, J., dissenting).

170 *Id.* at 77-78 n.1 (citing H. Stephen Harris, Jr. & Michael P. Kenny, *Eleventh Amendment Jurisprudence After Atascadero: The Coming Clash with Antitrust, Copyright, and Other Causes of Action Over Which the Federal Courts Have Exclusive Jurisdiction*, 37 EMORY L.J. 645 (1988)).

171 527 U.S. 706 (1999).

172 *Id.* at 712 (holding the State of Maine immune from a Fair Labor Standards Act claim in state court).

173 521 U.S. 507 (1997).

174 *Id.* at 519-20. *Boerne* held that the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000), was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or

connection with trademark,¹⁷⁵ patent,¹⁷⁶ and age and disability discrimination claims,¹⁷⁷ among other things.

Yet, within five years, the Court appeared to backtrack—or at least to recognize an exception for bankruptcy. In *Tennessee Student Assistance Corp. v. Hood*,¹⁷⁸ the Court held that a state was not immune from a proceeding in a bankruptcy court to establish the debtor's discharge from her debt to the state.¹⁷⁹ Chief Justice Rehnquist's majority opinion focused not on the nature of the Bankruptcy Clause,¹⁸⁰ but instead on the nature of the proceeding under which the debtor's debt was discharged. The Chief Justice reasoned that because bankruptcy was an "in rem" proceeding,¹⁸¹ the bankruptcy court's jurisdiction was "premised on the res, not on the persona."¹⁸² Being an in rem proceeding somehow altered the nature of the action commenced against the state. Although denominated an "adversary proceeding"¹⁸³—and in almost every material respect identical to a civil

designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections." *Boerne*, 521 U.S. at 532.

175 See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999).

176 See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637–38 (1999).

177 See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding states immune from Americans with Disabilities Act claims); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80–81 (2000) (holding states immune from Age Discrimination Employment Act claims).

178 541 U.S. 440 (2004).

179 *Id.* at 443. So as not to overstate the claim that bankruptcy was entirely exceptional here, *Hood* was preceded by the Court's decision one year earlier in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), which held that state employees may recover money damages in federal court in the event of the state's failure to comply with the family-care provision of the Family and Medical Leave Act of 1993. See *id.* at 727–28. *Hibbs* may be distinguishable from *Hood*, however, in that it was decided under Section 5 of the Fourteenth Amendment, and the "congruence and proportionality" standard developed thereunder in *Boerne*. *Id.* at 728 (quoting *Boerne*, 521 U.S. at 520).

180 Curiously, the Chief Justice's opinion does start by quoting it. *Hood*, 541 U.S. at 443 ("Article I, § 8, cl. 4, of the Constitution provides that Congress shall have the power '[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.'").

181 *Id.* at 447.

182 *Id.* at 450.

183 *Id.* at 451. The discharge sought in *Hood* required commencement of an "adversary proceeding," governed by Part VII of the Federal Rules of Bankruptcy Procedure, which incorporates many but not all of the Federal Rules of Civil Procedure. FED. R. BANKR. P. 7001–7087. An adversary proceeding requires, among other things, the service of a summons and a complaint. See *id.* 7001(6), 7003, 7004.

complaint—the action was nevertheless “part of the original bankruptcy case and still within the bankruptcy court’s *in rem* jurisdiction.”¹⁸⁴ Not being a suit, the state was, a fortiori, subject to the discharge complaint.

Few constitutional problems are as vexing as those posed by state sovereign immunity and the Eleventh Amendment. As is well known, the Eleventh Amendment was a response to *Chisholm v. Georgia*,¹⁸⁵ where the Supreme Court held that states could be subject to suit in United States district courts to collect debts incurred to finance the Revolution.¹⁸⁶ Over the years, four general theories have emerged to explain immunity and the Eleventh Amendment.

1. *Abrogation*. The first, and most nearly textual vision of the Eleventh Amendment, is that of abrogationists. According to Redish and Greenfield, this position reflects the view that “the Eleventh Amendment was intended to cabin the authority of the *federal judiciary* to abrogate state sovereign immunity, but not deprive *Congress* of that authority.”¹⁸⁷

2. *Diversity*. The “diversity” theory holds that the Eleventh Amendment bars only suits against a state when jurisdiction is grounded solely on the diversity of the parties—i.e., a state cannot be sued in a federal court by a citizen of another state. This view was introduced by Justice Brennan’s dissent in *Atascadero State Hospital v. Scanlon*.¹⁸⁸

184 *Hood*, 541 U.S. at 452 (citation omitted).

185 2 U.S. (2 Dall.) 419 (1793).

186 In *Chisholm*, the Court held that a citizen of South Carolina could bring an assumpsit action in federal court against the State of Georgia. *Id.* at 480. The Court rejected Georgia’s contention that its sovereign nature protected it from being sued in federal court and that the provision of Article III extending jurisdiction to controversies “between a State and Citizens of another State,” U.S. CONST. art. III, § 2, cl. 1, applied only when the state was the plaintiff in the action. See *Chisholm*, 2 U.S. (2 Dall.) at 469 (opinion of Wilson, J.).

187 Redish & Greenfield, *supra* note 158, at 23 (citing John E. Nowak, *The Scope of Congressional Power To Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975)); see also Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 684 (1976) (“Eleventh [A]mendment jurisprudence has left no doubt that the amendment not only reversed *Chisholm*, but also countermanded any judicial inclination to interpret article III as a self-executing abrogation of state immunity from suit” (footnote omitted)).

188 473 U.S. 234, 258–90 (1985) (Brennan, J., dissenting).

3. *The "Plan-of-the-Convention."* The "Plan-of-the-Convention" theory was propounded in *Pennsylvania v. Union Gas Co.*¹⁸⁹ This is "premised on the concept 'that the States enjoy no immunity where there has been a surrender of this immunity in the plan of the [constitutional] convention.'"¹⁹⁰ Its principal expression has been *Katz*.¹⁹¹

4. *Common law.* Under cases like *Hans v. Louisiana*¹⁹² and *Alden*, immunity from suit is not a function of the text of the Eleventh Amendment. Rather, it is inherent in the nature of statehood, which neither the plan of the Convention nor Congress could alter—a form of constitutional "common law."¹⁹³

The Eleventh Amendment has something to make just about everybody unhappy. It challenges any textualist approach to the Constitution, since the Court has for many years given it a meaning vastly different from the common understanding of its language.¹⁹⁴ For originalists who may feel themselves drawn to text, it is difficult to imagine that the Framers of the amendment in fact intended something different from the Amendment's "unusually precise" provisions.¹⁹⁵ For those who view the Constitution as laying atop a foundation of "natural" or "common" law of which sovereign immunity is a core feature, the history that preceded and followed the Amendment suggests that, so far as the Framers were concerned, states had no such immunity.¹⁹⁶ For those who view the Constitution

189 491 U.S. 1, 19–20 (1989) (plurality opinion), *overruled by* *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

190 Redish & Greenfield, *supra* note 158, at 23 (alteration in original) (quoting *Union Gas*, 491 U.S. at 19–20 (plurality opinion)).

191 See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 373–78 (2006).

192 134 U.S. 1 (1890).

193 See Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 553 n.6 (2006) (characterizing *Hans* as an application of common law principles to constitutional law interpretation).

194 See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1345 (1989) ("[I]t is . . . difficult to think of any other facet of the Constitution with respect to which the Court has reached results so obviously inconsistent with the words used by the framers.").

195 See *id.* at 1346.

196 While the Eleventh Amendment may have overruled *Chisolm*, that case was not an aberration. Even after the decision, but before ratification of the Eleventh Amendment, the Supreme Court continued to treat states as ordinary defendants, issuing process against the Commonwealth of Massachusetts in the unreported case of *Vassall v. Massachusetts* on behalf of a loyalist seeking to recover property confiscated by the state. See Marshall, *supra* note 194, at 1357 & n.62. After ratification of the Eleventh Amendment, the Court continued to hold that states could be subject to federal court review. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court held that the Commonwealth of Virginia was not immune from a "writ of error." *Id.* at 407. The

as a “living document,” designed to change with the times, subject to principles of *stare decisis*, the Amendment is a study in schizophrenia; interpreted first narrowly as written,¹⁹⁷ then ignored in *Hans*, then contracted throughout the New Deal,¹⁹⁸ then dilated in *Seminole Tribe*.¹⁹⁹ The Eleventh Amendment may be a product of political compromise,²⁰⁰ but what guidance does a spirit of compromise give courts trying to decide whether states may, or may not, be hauled into a federal bankruptcy court? Yet, this is what *Katz* and *Hood* tell us can happen.

The fact is that *Katz* is problematic. Evidence that the Framers wanted to create a congressional power to preempt inconsistent state laws is not evidence that Congress wanted to empower individuals to drag states into federal courts. Moreover, it suggests that later amendments to the Constitution do not constrain the bankruptcy power. It is unlikely Congress will take *Katz* and run too far with that suggestion. But, as argued in Part II.B.3 above, a reasonable inference would be that *Katz* could form the basis for a bankruptcy power unchecked by the First, Fifth, or any other Amendments.²⁰¹

While *Katz*’s analysis leaves something to be desired, there is much to be said for the result. It is hard to find a compelling basis in constitutional text or policy for exempting states from bankruptcy court process, especially as Congress has been fairly solicitous of states’ economic interests by providing special treatment for many state tax and similar claims.²⁰² From a textual standpoint, it seems unlikely that the Eleventh Amendment has much to do with bankruptcy. The Eleventh Amendment applies by its terms only to the “judicial power.” Thus, if one is an abrogationist, one might say Con-

state was not immune, in part, because the writ was not a “suit” within the language of the Eleventh Amendment, but instead “a commission by which the judges of one Court are authorized to examine a record upon which a judgment was given in another Court.” *Id.* at 409.

197 See *Cohens*, 19 U.S. (6 Wheat.) at 412 (holding that a “writ of error” was not a “suit” and therefore a state was not immune).

198 See, e.g., *Missouri v. Fiske*, 290 U.S. 18, 25 (1933).

199 See *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996).

200 See Marshall, *supra* note 194, at 1353.

201 A recent case note in the *Harvard Law Review* observes that *Katz*’s weaknesses include its failure to fully flesh out the limits of its *in rem* analysis and to back up its suppositions about original intent. See Case Comment, *State Sovereign Immunity—Bankruptcy*, 120 HARV. L. REV. 125, 131–32 (2006).

202 See Lipson, *Fighting Fiction*, *supra* note 6, at 1275 (“The new federalism should tolerate the subordination and discharge of state claims because Congress carefully tailored the Bankruptcy Code to reflect the needs of the states by giving priority to, and exempting from discharge, a variety of state tax claims.”).

gress—which exercises legislative, not judicial, power—can do anything it likes to states under the bankruptcy power. Whether it does so through a court is incidental. Moreover, the concerns that gave rise to the Eleventh Amendment—serious challenges to fragile state fiscs—have little in common with the problems presented by subjecting states to bankruptcy court power today. Massive public financial failure was a credible—albeit possibly exaggerated—concern in the wake of *Chisholm*.²⁰³ Today, it is unlikely states will become insolvent by virtue of *Katz*.

Whether one agrees or disagrees with the result in *Katz*, the fact is that it strongly smacks of exceptionalism. According to Professor Plank, “[C]ourts most likely will view *Katz* as creating a special exception to the States’ general sovereign immunity when Congress acts pursuant to its power to ‘establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.’”²⁰⁴ Although the Rehnquist Court also deferred in sometimes surprising ways in respect of other Article I powers,²⁰⁵ it did not do so with the depth or force seen in *Katz*. While principles of sovereign immunity may limit Congress’ other Article I powers to create federal jurisdiction over states, bankruptcy would appear to be an exception.

B. Horizontal Relations

The prior subpart demonstrated that the constitutional trend in states’ rights seems to have reached its limit—or found an exception—in bankruptcy. Horizontal—meaning interbranch—relations are perhaps even more perplexing than those involving the states. Here, too, bankruptcy appears to generate exceptional constitutional rules, standards, norms, and values. Unlike virtually every other developed congressional power under Article I, the bankruptcy power is conducted almost entirely in courts.²⁰⁶ The principal horizontal prob-

203 See Michael S. Schreiber, *Original Intent and the Bankruptcy Power: What Were They Thinking?*, 2 DEPAUL BUS. & COM. L.J. 165, 166 (2003) (indicating that the states had borrowed approximately \$200 million to finance the War of Independence).

204 Plank, *supra* note 159, at 59–60 (quoting U.S. CONST. art. I, § 8, cl. 4).

205 The principal example here will be *Eldred v. Ashcroft*, 537 U.S. 186 (2003), where the Supreme Court upheld the Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998), as permitted by the Intellectual Property Clause. *Eldred*, 537 U.S. at 198.

206 Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 84 (2006) (“Bankruptcy is the only major statutory system in the United States without a federal agency responsible for its implementation. Instead, in bankruptcy, the courts play the role that agencies fill in other areas of law.”).

lem has been that the status and jurisdiction of these bankruptcy courts is far from clear.

Strictly speaking, bankruptcy jurisdiction is lodged in United States *district courts*, which have “original and exclusive jurisdiction” of “cases” arising under the Bankruptcy Code.²⁰⁷ As a practical matter, however, all of the important business in bankruptcy is conducted through “proceedings,” which are the constituent parts of the “case.”²⁰⁸ When it comes to these “proceedings,” the district courts have original but *not* exclusive jurisdiction: to a greater or lesser extent, this jurisdiction over proceedings in bankruptcy cases can be—and as a practical matter almost always is²⁰⁹—“referred” to bankruptcy courts.²¹⁰ District courts, then, usually sit in an appellate capacity with respect to most, but not all, bankruptcy matters.²¹¹

At least as a conceptual matter, bankruptcy jurisdiction is exceedingly—perhaps needlessly—complex and uncertain. As Professor Brubaker has noted, “[T]he jurisdiction in bankruptcy remains one of the most enduring puzzles of our federal court system.”²¹² The puzzle is due in part to the uncertain location of the bankruptcy courts on

207 28 U.S.C. § 1334(a) (2000) (emphasis added).

208 See CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* § 11.6, at 778–79 (1997); see also *id.* § 4.1, at 217 (“[B]ankruptcy case[s] [are] composed of many different types of matters and ‘proceedings.’ These proceedings range in complexity from uncontested administrative tasks to full-scale adversarial litigation. Traditional civil lawsuits of the ‘A versus B’ variety comprise only a small portion of a typical bankruptcy case.”).

209 See Darrell Dunham, *Bankruptcy Court Jurisdiction*, 67 UMKC L. REV. 229, 281 (1998).

210 28 U.S.C. § 157(a) (2000).

211 As is familiar to bankruptcy practitioners, bankruptcy judges may “hear and determine” “core” matters, the first of which is, interestingly, not a traditional matter of adjudication, but instead the “administration of the estate.” *Id.* § 157(b)(2)(A). Final orders issued by a bankruptcy court involving core matters are reviewed on an appellate basis by the district court. The bankruptcy judge may not, however, “determine” or enter final orders regarding “non-core” proceedings that are “related to” the bankruptcy case. See *id.* § 157(c)(1). As to these matters, the bankruptcy court may make proposed findings of fact and conclusions of law, which the district court shall review not in an appellate capacity, but *de novo*. *Id.* Much of the controversy about bankruptcy jurisdiction surrounds the reach of this “related to” jurisdiction. See generally Brubaker, *supra* note 6, at 751 (“[T]his Article proffers a comprehensive, unifying statutory and constitutional theory that would vastly simplify and bring principled limits to third-party ‘related to’ bankruptcy jurisdiction.”).

212 Brubaker, *supra* note 6, at 746. “[B]ankruptcy,” he continues, “has become the seemingly inscrutable crucible of federal jurisdiction theory. In fact, because it is not easily explained by traditional theory, most scholars rely upon bankruptcy to buttress novel and unconventional departures that would accommodate the apparent anomaly of federal bankruptcy jurisdiction.” *Id.* at 747.

the horizontal axis in the constitutional structure. On the one hand, bankruptcy judges are clearly not Article III judges.²¹³ They are not appointed for life by the President or protected against salary diminution, as would be the case with Article III judges.²¹⁴ Instead, they are appointed by the United States courts of appeals, with terms of fourteen years.²¹⁵ On the other hand, while they are Article I judges,²¹⁶ they are statutorily characterized as “judicial officer[s] of the district court,” and the bankruptcy courts are “units” of the district courts.²¹⁷

The duality of bankruptcy jurisdiction partially reflects deeper problems with the separation of Article I and Article III powers, a subject with its own considerable uncertainties. The literature suggests at least three different approaches to this broader question. First, the Court may set forth categorical constraints on what goes in the Article I bucket, and what goes in the Article III bucket. The most recent—and controversial—example of this is, as discussed below, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,²¹⁸ which struck down the initial grant of jurisdiction under the current Bankruptcy Code.²¹⁹ Second, the Court may engage in some form of balancing test, as it did implicitly in *Thomas v. Union Carbide Agricultural Products Co.*,²²⁰

213 Article III provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

214 Article II provides:

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, §2, cl. 2.

215 28 U.S.C. § 152(a)(1) (2000).

216 Article I gives Congress the power to “constitute Tribunals inferior to the supreme Court.” U.S. CONST. art. I, § 8, cl. 9.

217 28 U.S.C. § 151 (2000).

218 458 U.S. 50 (1982).

219 *Id.* at 87.

220 473 U.S. 568, 586–89 (1985).

and explicitly in *Commodity Futures Trading Commission v. Schor*.²²¹ Third, a number of academics have argued that the dispositive issue should be the presence of appellate review by an Article III court of non-Article III judicial actions.²²²

While there are many explanations for the complexity and uncertainty of the current distribution of bankruptcy powers, the current system—and its puzzles—are the product of at least two basic trends which have combined to render bankruptcy jurisdiction constitutionally exceptional in a variety of ways. This subpart explains these trends, the first of which involves developing understandings of the distinction between public and private rights, and the second of which involves the treatment of bankruptcy as a judicial rather than an administrative problem.

1. Public-Private Trend

The first trend affecting bankruptcy jurisdiction involves a transformation in the way we understand bankruptcy as a function of public versus private rights. Historically, financial distress was considered a public problem, which required public responses. The earliest forms of response were quintessentially public: incarceration in debtors' prison or worse.²²³ Relief from debt was also quintessentially public. One of the earliest versions of the discharge was a declaration from Caesar available beginning around 46 B.C.E., known as the *cessio bonorum*, whereby debts would be forgiven under certain circumstances—a public form of debt jubilee.²²⁴ Colonial and state legislatures through the nineteenth century frequently enacted so-called

221 478 U.S. 833, 851 (1986).

222 The leading citation here is usually Fallon, *supra* note 38, at 933 ("The core claim of this theory is that sufficiently searching review of a legislative court's or administrative agency's decisions by a constitutional court will always satisfy the requirements of article III."); see also Pfander, *supra* note 38, at 647 n.10 (collecting authorities); see also *id.* at 666–71 (criticizing appellate review theory). Among other things, the appellate review theory is "embarrassed" by the fact that it would conflict with the Constitution's literal limitations on Congress' power to create inferior courts or tribunals (which does not expressly include an appellate review element). *Id.* at 667–68.

223 Blackstone, among others, indicates that prior to English law, which itself provided the death penalty for debt defaults, insolvency could be punished by imprisonment or slavery of the debtor, or the sale and enslavement of the debtor's family. See 2 BLACKSTONE, *supra* note 29, at *473.

224 See Theodore C. Albert, *The Insolvency Law of Ancient Rome*, 28 CAL. BANKR. J. 365, 383 & n.102 (2006).

“private” bankruptcy bills—individualized grants of bankruptcy relief.²²⁵

We have moved from these more overtly public responses to financial distress to ones that are now significantly—but not exclusively—private. A major change in this regard occurred in the middle of the nineteenth century, with the advent of the federal equity receivership, a proceeding in many respects analogous to the Chapter 11 reorganization.²²⁶ In federal equity receiverships, federal district judges presided over the consensual—that is, contractual—restructuring of the debtor’s financial relationships.²²⁷ Today, there are increasing calls to make contract—a largely private institution—the response of first resort to any question of financial distress.²²⁸ Indeed, this is at the heart of the creditors’ bargain, discussed in Part I.A above.

Making a hard distinction between public and private is somewhat artificial, especially in bankruptcy. Yet, it was central to the Supreme Court’s conclusion that the original grant of bankruptcy jurisdiction under the current Bankruptcy Code was unconstitutional in *Northern Pipeline*.²²⁹ Factually, *Northern Pipeline* could not have been a simpler case. Northern Pipeline was a Chapter 11 debtor with a state private law breach of contract claim against Marathon Pipe Line.²³⁰ Marathon moved to dismiss on the grounds that the Bankruptcy Act of 1978 gave bankruptcy judges Article III powers, without giving them Article III protections, in particular against firing (life

225 See, e.g., COLEMAN, *supra* note 28, at 14 (describing “*ad hoc*” legislation providing relief to “named insolvents”).

226 These reorganizations were, until 1933, governed largely by contract, and not by the Bankruptcy Code or anything resembling it. In 1933, Congress enacted section 77 of the Bankruptcy Act in order to address the “sudden evaporation of railroad earning power” that “was plunging thousands of miles of lines into insolvency.” Act of Mar. 3, 1933, ch. 204, § 77, 47 Stat. 1467, 1474–82, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1330 (2000 & Supp. V 2005)); see also REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. I, at 263 (1973) [hereinafter 1973 COMMISSION REPORT] (“[S]ection 77 was originally added to the Bankruptcy Act in 1933 and completely rewritten in 1935 for purposes of rearrangement, simplification, and clarification.” (footnotes omitted)). A useful recent discussion of the realities of the railroad reorganizations appears in Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 CORNELL L. REV. 1420, 1453–68 (2004).

227 See Lubben, *supra* note 226, at 1441–46.

228 See, e.g., Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1819–33 (1998).

229 *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71–72 (1982) (plurality opinion).

230 *Id.* at 56.

tenure) and salary diminution.²³¹ Although the bankruptcy court denied the motion, the district court reversed on appeal.²³² The Supreme Court upheld the district court.²³³

The plurality opinion, written by Justice Brennan (joined by Justices Marshall, Blackmun, and Stevens), rested on a fairly rigid separation of powers analysis. The 1978 Act gave bankruptcy courts jurisdiction over "all civil proceedings arising under title 11 or arising in or related to cases under title 11."²³⁴ This was problematic because, according to the plurality, it vested the "judicial power" in bankruptcy judges who did not have Article III status (life tenure and protection against salary diminution).²³⁵ The bankruptcy courts created in the 1978 Act could be tolerated only if they fit within one of three "narrow,"²³⁶ categorical exceptions to Article III adjudication: (1) they were "territorial" courts, (2) they involved "courts martial," or (3) they involved the adjudication of "public rights."²³⁷ Since bankruptcy involved neither of the first two, the important question was whether bankruptcy jurisdiction involved "public rights" or "private rights."²³⁸

The plurality apparently concluded that the debtor's breach of contract claim was a "private" right that could not be adjudicated by a bankruptcy court:

The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must at a minimum arise "between the government and others." In contrast, "the liability of one individual to another under the law as defined," is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.²³⁹

The debtor's breach of contract claim in *Northern Pipeline* was "clearly . . . subject to Art[icle] III" because it was a "private adjudica-

231 See *id.* at 56–57.

232 *Id.*

233 *Id.* at 88.

234 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, sec. 241(a), § 1471(b)–(c), 92 Stat. 2549, 2668.

235 *N. Pipeline*, 458 U.S. at 86 (plurality opinion).

236 *Id.* at 64.

237 See *id.* at 64–70.

238 See *id.* at 67–70.

239 *Id.* at 69–70 (internal citations and footnotes omitted).

tion[,] . . . [a] matter[] from [its] nature subject to 'a suit at [the] common law or in equity or admiralty.'"²⁴⁰ The United States was not a "proper party" to that dispute.²⁴¹ This placed it outside "the core of the federal bankruptcy power"—"the restructuring of debtor-creditor relations."²⁴² Because private adjudications were at the heart of Article III judging, and bankruptcy judges lacked Article III status, the bankruptcy court could not decide *Northern Pipeline's* breach of contract claim against Marathon. Nor could the Bankruptcy Clause overcome this. The appellants had argued that cases such as *Palmore v. United States*²⁴³ gave Congress the power to limit Article III jurisdiction in "'specialized areas having particularized needs and warranting distinctive treatment.'"²⁴⁴ Bankruptcy should be one of these, they argued, as evidenced by the Bankruptcy Clause. Justice Brennan rejected this because, he argued, "it provides no limiting principle."²⁴⁵

Evidence that bankruptcy jurisdiction is constitutionally exceptional derives from the fact that the Court soon abandoned *Northern Pipeline's* approach to the public-private rights analysis, first in *Union Carbide* and then in *Schor*. In *Union Carbide*, the Court permitted Congress to require binding arbitration of claims filed under the Federal Insecticide, Fungicide, and Rodenticide Act²⁴⁶ with limited Article III judicial review.²⁴⁷ "Public rights," according to the *Union Carbide* Court are not, contra *Northern Pipeline*, limited to those "'arising between the Government and persons subject to its authority.'"²⁴⁸ Rather, they involve rights arising under federal statutes that do not "depend on or replace a right . . . under state law."²⁴⁹ *Union Carbide* read *Northern Pipeline* to mean that Congress could not "vest in a non-Article III court the power to adjudicate, render final judgment,

240 *Id.* at 70–71 n.25 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)).

241 *See id.* at 69–70 n.23 ("[T]he presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'").

242 *Id.* at 71.

243 411 U.S. 389 (1973).

244 *N. Pipeline*, 458 U.S. at 72 (plurality opinion) (quoting *Palmore*, 411 U.S. at 408).

245 *Id.* at 73.

246 Ch. 125, 61 Stat. 163 (1947) (codified as amended in scattered sections of 7 U.S.C.).

247 *See* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582–84 (1985).

248 *Id.* at 585 (quoting *N. Pipeline*, 458 U.S. at 67–68 (plurality opinion)).

249 *Id.* at 584.

and issue binding orders in a traditional contract action arising under state law, without consent of the litigants.”²⁵⁰

In *Schor*, Justice O’Connor observed that “there is no reason inherent in separation of powers principles to accord the state law character of a [private rights] claim talismanic power in Article III inquiries.”²⁵¹ Like *Union Carbide*, and contra the teaching of *Northern Pipeline*, *Schor* involved a dispute not between the government and an individual, but instead between two private parties—a disgruntled stock customer suing his broker under the Commodities Futures Trading Commission Act.²⁵² Initially, the plaintiff’s case was heard by the Commodity Futures Trading Commission (CFTC), which by regulation permitted the broker-defendant to assert counterclaims arising out of the same transaction or occurrence against the customer.²⁵³ When the CFTC decided the counterclaims in the defendant’s favor, the plaintiff claimed the administrative body lacked jurisdiction over the counterclaim.²⁵⁴

In concluding that this non-Article III entity had jurisdiction to resolve this dispute between two private parties, Justice O’Connor distinguished *Northern Pipeline* on the grounds that the bankruptcy jurisdiction at issue in that case was much broader than that of the CFTC.²⁵⁵ Moreover, although the CFTC could resolve the dispute, the victor would still have to go to a district court to enforce whatever decree the agency issued.²⁵⁶ As Carl Pickerill has observed, “While *Schor* did not overrule *Northern Pipeline* explicitly, one must wonder whether *Northern Pipeline* still has staying power” as a guide to the public-private distinction in federal jurisdiction.²⁵⁷ In other words, *North-*

250 *Id.* (citing *N. Pipeline*, 458 U.S. at 84 (plurality opinion); *id.* at 90–92 (Rehnquist, J., concurring); *id.* at 92 (Burger, C.J., dissenting)).

251 *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853 (1986).

252 *Id.* at 837.

253 *Id.*

254 *See id.* at 838.

255 *See id.* at 852–53 (characterizing bankruptcy jurisdiction as unconstitutional because it includes “all civil proceedings arising under title 11 or arising in or related to cases under title 11” (quoting 28 U.S.C. § 1471(b) (1982))).

256 *Id.* at 853.

257 Carl N. Pickerill, Note, *Specialized Adjudication in an Administrative Forum: Bridging the Gap Between Public and Private Law*, 82 NOTRE DAME L. REV. 1605, 1642 (2007) (footnote omitted) (“*Schor* seems to permit non-Article III courts to exercise jurisdiction over cases normally heard by either federal or state court judges, as long as the case is not terribly important and the judicial power is not terribly infringed. *Northern Pipeline*, however, seemed to deny that same exercise of jurisdiction to the Bankruptcy court.” (footnote omitted)). Indeed, it would appear that even Justice Brennan, who authored the plurality opinion in *Northern Pipeline*, soon came to a different view. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989) (“The crucial question, in

ern Pipeline may reflect a theory of the public-private distinction applicable to only one form of federal jurisdiction—bankruptcy.²⁵⁸

2. The Adjudication of Bankruptcy

Northern Pipeline instantly presented a crisis for Congress, which returned to the drawing board in order to produce a jurisdictional scheme that would survive constitutional challenge. That scheme is the current version of the Bankruptcy Code, whose jurisdictional provisions were enacted in 1984, and are summarized above.²⁵⁹

The jurisdiction that Congress originally conferred on bankruptcy courts—and that *Northern Pipeline* struck—was probably the high point in a second long-term trend in the development of bankruptcy jurisdiction, a trend towards treating it as a matter of judicial, rather than administrative, concern. In England before the Framing, according to Blackstone, bankruptcy involved an “extrajudicial method of proceeding” before commissioners who lacked life tenure and who oversaw the administrative and judicial management of debtors’ estates.²⁶⁰ The administrative nature of bankruptcy was replicated in early bankruptcy legislation in the United States, which tended to lodge both administrative and judicial functions in a single, non-Article III “commissioner.”²⁶¹

cases not involving the Federal Government, is whether ‘Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.’” (alteration in original) (quoting *Union Carbide*, 473 U.S. at 593–94)).

258 *Northern Pipeline* may also be exceptional in the sense that it was really a response by the Court to a specific concern about congressional encroachment on the judicial power. Erwin Chemerinsky has argued that the decision was a reaction to a unique historical time, when Congress was increasingly trying to tread on the judiciary. See Chemerinsky, *Courts*, *supra* note 38, at 123. *Northern Pipeline* may have been exceptional because it was intended to send a message to Congress about the limits of its structural power vis-à-vis the federal judiciary. This would tend to undercut the view that exceptionalism is driven by financial distress. But, it suggests that bankruptcy may be sufficiently different that it is permissible to use it as a vehicle to send such a message.

259 See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11, 28 U.S.C.); *supra* notes 207–10 and accompanying text.

260 2 BLACKSTONE, *supra* note 29, at *477.

261 Both the United States Bankruptcy Act of 1800 and Pennsylvania’s Bankruptcy Act of 1785 created “commissioners” who performed both judicial and administrative functions, the latter including the collection and administration of the debtor’s estate pending distribution to creditors. See Bankruptcy Act of 1800, ch. 19, § 2, 2 Stat. 19,

This began to change, however, with the Bankruptcy Act of 1841, which gave United States district courts “jurisdiction in all matters and proceedings in bankruptcy arising under [the 1841] act.”²⁶² In *Ex parte Christy*,²⁶³ Justice Story concluded that this created a very broad bankruptcy jurisdiction, over “all matters and proceedings in bankruptcy arising under” the 1841 Act.²⁶⁴ While this jurisdiction was not lodged in bankruptcy judges, as such, it was vested in the judiciary, rather than in “commissioners” or assignees, as had previously been the case.²⁶⁵

The complicated history that followed contains much nuance, but can be seen as a dialectic between vesting bankruptcy powers in Article III judges as against relegating this work to nonjudicial actors. When today’s Bankruptcy Code was being developed in the 1970s, a number of observers—in particular, bankruptcy referees and professionals—argued that Congress should create bankruptcy judgeships with Article III status.²⁶⁶ This effort failed, due largely to the intercession of Chief Justice Burger and resistance from other federal judges, who viewed bankruptcy judges as “inferior.”²⁶⁷ As Bankruptcy Judge Mund recently explained:

21–22 (repealed 1803); Act for the Regulation of Bankruptcy, ch. 1183, § 2 (1785), reprinted in 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 70, 71 (1906); see also John C. McCoid, II, *Right to Jury Trial in Bankruptcy*: *Granfinanciera, S.A. v. Nordberg*, 65 AM. BANKR. L.J. 15, 30 (1991) (noting that while bankruptcy commissioners “clearly functioned in a judicial fashion” at least some of their work “more nearly resembled the activities of our present-day administrative agencies”).

262 Bankruptcy Act of 1841, ch. 9, § 6, 5 Stat. 440, 445 (repealed 1843).

263 44 U.S. (3 How.) 292 (1845).

264 *Id.* at 313. *Christy* involved an assignee’s suit to recover real estate seized from the debtor in mortgage foreclosure proceedings in state court prior to commencement of the bankruptcy proceedings. *Id.* at 298. The assignee challenged the validity of the underlying mortgages. See *id.* at 293–97, 308–11.

265 See Brubaker, *supra* note 6, at 759 (“After a nearly forty-year hiatus in federal bankruptcy law, the Bankruptcy Act of 1841 . . . brought the first explicit statutory grant of a general federal jurisdiction over all ‘bankruptcy proceedings.’”).

266 See DAVID A. SKEEL, JR., *DEBT’S DOMINION* 157–58 (2001).

267 See *id.* at 158 (“Chief Justice Burger shared the district judges’ concerns about diluting the federal bench and about the inferior quality of many bankruptcy judges.”). Judge Mund quotes the following letter from Justice Burger to President Carter:

To put it bluntly, [giving bankruptcy judges Article III status] stems from the desire of those officers who were initially appointed to office as bankruptcy referees and who serve as adjunct aides to District Judges to achieve a higher status, with virtually all but the status of “life tenure” judges—almost like promoting all the Army’s Sergeants Major to Captain rank!

Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978—Part One: Outside Looking In*, 81 AM. BANKR. L.J. 1, 2 (2007) (quot-

There was a certain stigma attached to bankruptcy practice and practitioners. The district court appointed referees-in-bankruptcy, who were paid a portion of the assets that passed through their administration. The referees dealt with the mundane business affairs of the cases, even signing the disbursement checks. They handled neither the significant constitutional issues nor the high profile civil and criminal ones that drew politically well-connected attorneys to the Article III bench.²⁶⁸

Yet, the fact is that the bankruptcy referees and professionals were able to strike a terrific political coup in capturing the jurisdiction and status they did obtain under the 1978 Act. The result of their efforts, among other things, "increased the profile and potential power of bankruptcy judges to such an extent that the Article III judiciary could no longer ignore the implications of the proposed changes. This led to almost instant backlash and an internecine fight within the judicial branch."²⁶⁹ *Northern Pipeline* was the knockout round in that fight.

The current distribution of bankruptcy jurisdiction reflects a series of political decisions to make bankruptcy a matter of adjudication rather than agency administration. Yet, part of what makes bankruptcy jurisdiction so complex is the fact that bankruptcy judges are, for all practical purposes, both adjudicators and administrators in ways that may be unique in our federal system.²⁷⁰ When they hear and determine "core" disputes—characterized as either "adversary proceedings" or "contested matters"—they are clearly exercising a judicial function.²⁷¹ Yet, much of the work of bankruptcy courts is administrative, or at least so different in kind from the work of Article

ing Letter from Chief Justice Warren Burger to President Jimmy Carter (Oct. 27, 1978)).

268 Mund, *supra* note 267, at 3.

269 *Id.* at 30.

270 See TABB, *supra* note 208, § 4.1, at 217 (characterizing bankruptcy jurisdiction as "unique"). As Professor Brubaker has observed in a slightly different context:

A bankruptcy "case," though, is *not* the equivalent of an ordinary civil "case." Bankruptcy contains a unique admixture of ordinary adversarial litigation, contested administrative hearings, and judicial oversight of an administrative process—some of which contains litigable controversies and some of which does not. An attempt to find a uniform theory that explains all of bankruptcy jurisdiction as one constitutional "case," then, seems predestined to fall short

Brubaker, *supra* note 6, at 806. The largely administrative character of most bankruptcies was emphasized by the comprehensive Brookings Institute study of DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY* 147-72 (1971).

271 See FED. R. BANKR. P. 7001-7087 (adversary proceedings); *id.* 9014 (contested matters).

III district court judges as to be unrecognizable as adjudication. Indeed, an entire chapter of the Bankruptcy Code—Chapter 3—is devoted to “case administration.”²⁷² Among other things, bankruptcy judges (1) accept the filing of bankruptcy petitions;²⁷³ (2) remove bankruptcy trustees;²⁷⁴ (3) approve the retention of professionals in the case;²⁷⁵ (4) review and approve applications for the payment of professionals’ fees;²⁷⁶ (5) review and approve requests for the debtor to engage in nonordinary-course transactions, including undertaking financing and selling assets;²⁷⁷ (6) manage the filing, and allowance or disallowance, of claims and administrative expenses;²⁷⁸ (7) appoint trustees or examiners;²⁷⁹ (8) review and approve disclosure statements;²⁸⁰ (9) review and confirm plans of reorganization;²⁸¹ and (10) review, approve, and enter discharge orders.²⁸²

While many of these and other administrative matters could become disputed, and thus require a neutral judicial resolution, most do not. Yet, bankruptcy judges do these things regardless of the presence of adversity. In short, they play an important—but obviously not exclusive—role in managing bankruptcy cases in ways that district courts do not “manage” the cases and controversies that come before them.²⁸³ This is doubtless one reason district courts

272 11 U.S.C.A. §§ 301–366 (West 2004 & Supp. 2007).

273 *See id.* § 301 (West Supp. 2007); *see also* 1973 COMMISSION REPORT, *supra* note 226, at 121 (“[V]oluntary petitions do not pose any issues requiring judicial resolution . . .”).

274 *See* 11 U.S.C. § 324 (2000).

275 *See id.* § 327.

276 *See* 11 U.S.C.A. §§ 328, 330 (West 2004 & Supp. 2007).

277 *See id.* §§ 363–364.

278 *See id.* §§ 501, 502–503, 1111(a).

279 *See id.* § 1104.

280 *See id.* § 1125.

281 *See id.* § 1129.

282 *See id.* §§ 524, 1141(c).

283 Professor Pfander sends conflicting signals on how he views the nature of bankruptcy courts. On the one hand, he acknowledges that “bankruptcy operates as a mixed system. The bankruptcy courts act in part as Article I tribunals, handling matters within the traditional power of commissioners and referees, and being subject to eventual review in Article III courts.” Pfander, *supra* note 38, at 770. On the other hand, he suggests that they should perhaps become Article III courts because they are just judging:

As currently structured, the bankruptcy courts no longer perform any administrative function but act solely as neutral and independent tribunals for the resolution of disputes. Without any administrative role, the case for bankruptcy courts outside of Article III grows more difficult to sustain. One can fairly ask why Article III does not require Congress either to grant the

do not want to do bankruptcy work unless they absolutely have to take it.²⁸⁴

There is nothing exceptional about congressional powers that create both administrative and judicial work. Federal laws on taxation, intellectual property, and immigration, among others, do both. But unlike bankruptcy, these and other developed Article I powers are conducted through two distinct sets of mechanisms, agencies and courts. Income tax returns are not filed with the tax court, but the Internal Revenue Service.²⁸⁵ Patent applications and copyright registrations are not, in the first instance, submitted to federal courts for recognition, but instead to the Patent and Trademark Office or Copyright Register, respectively.²⁸⁶ Immigration decisions are made in the first instance by Immigration and Customs Enforcement (formerly known as the Immigration and Naturalization Service), and are then (usually) subject to judicial review.²⁸⁷

To be sure, bankruptcy has an administrative apparatus, the Office of the United States Trustee (UST).²⁸⁸ But its work is far more

bankruptcy courts formal Article III status or to transfer the work back onto the dockets of the district courts.

Id.

284 See H.R. REP. NO. 95-595, at 4, 49, 50-51, 107-08, 111 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5965-66, 6010-11, 6011-12, 6068-69, 6072-73; 1973 COMMISSION REPORT, *supra* note 226, at 5-6, 81, 85-86, 94, 112, 120-21, 126.

285 See 26 U.S.C. §§ 6301-6302 (2000).

286 See, e.g., *Tiseo Architects, Inc. v. SSOE, Inc.*, 431 F. Supp. 2d 735, 740 (E.D. Mich. 2006) ("[T]he Court appears to lack jurisdiction to cancel Plaintiff's copyright registration, which would be required were the Court to rule as Defendant suggests. The Register of Copyrights is vested with the authority to set regulations consistent with the Copyright statutes." (citing 17 U.S.C. § 702 (2000))).

287 See 8 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 104.01 (2005).

288 The duties of the UST are set forth in 28 U.S.C.A. § 586 (West 2006). Congress created the UST program in the 1978 Bankruptcy Code. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, ch. 15, 92 Stat. 2549, 2651-57 (codified as amended at 28 U.S.C.A. §§ 581-589 (West 2006 & Supp. 2007)). The UST was made a part of the Department of Justice rather than part of the court system to acknowledge the separation of administrative and adjudicative functions as well as to emphasize the UST's role as an enforcer of the bankruptcy laws. See H.R. REP. NO. 95-595, at 109 (1977), *reprinted in* 1978 U.S.C.C.A.N. 6070-71.

There was, at one point, support for the creation of a more substantive administrative bankruptcy mechanism. See Mund, *supra* note 267, at 17 (as proposed by the 1973 Bankruptcy Commission, "[t]he United States Bankruptcy Administration was to be created as an independent agency in the executive branch. It would receive the filings in all cases (except railroad reorganizations), would handle all claims and the first level of claims disputes, would generally administer every aspect of each consumer bankruptcy case that did not require judicial intervention, and would supervise

limited than that of the administrative apparatus associated with other Article I powers. Although the 2005 amendments to the Bankruptcy Code enhanced the role of the USTs, their principal goal is to police the bankruptcy system for signs of “cronyism” or debtor misconduct.²⁸⁹ Most of the substantive work of bankruptcy—both administrative and judicial—is conducted not before the USTs, but in bankruptcy courts.

Locating the bulk of bankruptcy work in courts rather than agencies suggests four kinds of structural exceptionalism. First, and most obviously, bankruptcy appears to be alone among the developed Article I powers that is conducted almost entirely in courts and not (also) in agencies. Moreover, *Northern Pipeline’s* apparently unique articulation of the (ostensibly exclusive) judicial role in resolving “private rights” disputes suggests that much of bankruptcy work *must* be done in courts.

Second, although bankruptcy is conducted in courts, it may also be an extreme—that is, exceptional—example of what Judith Resnik has called “managerial judging.”²⁹⁰ When judges act as “managers,” Resnik has argued, they

learn more about cases much earlier than they did in the past. They negotiate with parties about the course, timing, and scope of both pretrial and posttrial litigation. These managerial responsibilities give judges greater power. Yet the restraints that formerly circumscribed judicial authority are conspicuously absent. Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.²⁹¹

Resnik was concerned principally with federal judges who were called on to manage complex system reform litigations in the 1960s and 1970s.²⁹² Not surprisingly, given institutional constraints, federal district court judges have, to some extent, moved beyond the managerial

various aspects of business liquidation and reorganization.” (citing 1973 COMMISSION REPORT, *supra* note 226, at 94)). This failed for the same reason that bankruptcy referees became bankruptcy judges—a political choice was made to make the bankruptcy process judicial.

289 See Donna S. Tamanaha & Roberta A. DeAngelis, *General Overview of the United States Trustees Program*, in UNDERSTANDING THE BASICS OF BANKRUPTCY & REORGANIZATION 2006, at 257, 263–64 (PLI Commercial Law & Practice, Course Handbook Series No. A-890, 2006).

290 See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

291 *Id.* at 378.

292 See *id.* at 397–99.

model Resnik described.²⁹³ Nevertheless, given the highly administrative nature of bankruptcy, bankruptcy judges remain exemplars of this trend. Given the negotiated nature of much of bankruptcy—especially business cases in Chapter 11—it is not surprising that much of the real work of bankruptcy judges does not follow the adversarial common law template we generally associate with the judicial function. Although bankruptcy is more a creature of courts than any other Article I power, it may be the least “judicial” of those powers placed in the judiciary.

This paradox—bankruptcy is conducted in courts but often does not involve traditional adjudication—reflects a third way in which bankruptcy is structurally exceptional: it is both over- and underinclusive in ways unique to the federal judiciary. It is overinclusive because it vests “original” (but not “exclusive”) jurisdiction over non-Article III—nonjudicial—matters in Article III courts. The many administrative matters managed by bankruptcy courts may be a form of “managerial judging” but, as noted above, there are real questions about the boundaries of giving non-Article III powers to federal judges.²⁹⁴ We tolerate this because we say that United States district courts “refer” bankruptcy cases to bankruptcy judges, who are non-Article III actors. But that leaves an anomaly: how can an Article III court have the jurisdiction to refer matters which it in theory lacks the power to address?

Yet, bankruptcy jurisdiction is also underinclusive, in the sense that it gives to non-Article III actors powers that *Northern Pipeline* tells us *should* be decided by Article III judges. A reasonable inference from *Northern Pipeline* is that state private law matters must be addressed by Article III courts, and not by other branches. This is obviously problematic. A great deal of what bankruptcy courts do would appear to violate even the narrow reading of *Northern Pipeline* given in *Union Carbide*, which said *Northern Pipeline* applied only to “traditional contract action[s] arising under state law, without consent of the litigants.”²⁹⁵ When there are disputes in bankruptcy, they often involve state private law—indeed, most rights in bankruptcy derive in the first instance from such law. Usually, when a bankruptcy judge allows or disallows a disputed claim, she is “adjudicating” a matter of “private” state law at contract, tort, etc. Moreover, bankruptcy courts—not state courts—produce the vast majority of published

293 See, e.g., Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1019 (2004) (describing the transformation in system reform litigation from a “command and control” model to an “experimentalist” model).

294 See *supra* notes 217–22 and accompanying text.

295 *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985).

opinions on transactions under Article 9 of the Uniform Commercial Code, although this is a quintessential—and, to many, quintessentially important—piece of private state contract law.²⁹⁶ To my knowledge, no one argues that bankruptcy judges lack the power to decide these or similar matters.

This may bespeak the final, and most salient, way in which bankruptcy jurisdiction is constitutionally exceptional: as interesting and difficult as these problems are conceptually, they may just not matter. The meta-anomaly here may be that the exceptionalism of *Northern Pipeline* and bankruptcy jurisdiction has had little affect on the day-to-day operation of the system. By contrast, organic exceptionalism, and the exceptional treatment of vertical relations, discussed above,²⁹⁷ have influenced, and will likely continue to influence, how bankruptcy is conducted.

To be sure, there are border questions. There will be fights over a bankruptcy court's power to address noncore matters "related to" a bankruptcy case²⁹⁸ or personal injury tort claims, or to conduct jury trials, among other things. But the real core of the bankruptcy power itself rests on a constitutionally unstable blend of powers and duties that we tolerate ultimately because of the nature of bankruptcy. In theory, we could place much of the work of bankruptcy in a federal agency. But we would nevertheless have to contend with the "private" rights that, according to the *Northern Pipeline* plurality, must be adjudicated in an Article III court. We could, instead, make all bankruptcy judges Article III judges, although the administrative nature of bankruptcy work creates the equal and opposite problem: how much "managerial" and administrative work would we tolerate in bankruptcy judges vested with Article III status?

The answer must be that, at some important level, we just don't care. The reality is that, *Northern Pipeline* notwithstanding, the Supreme Court seems generally inclined to tolerate ever-expanding bankruptcy jurisdiction, as implied by such cases as *Granfinanciera*²⁹⁹

296 See Plank, *Article III*, *supra* note 6, at 568–69 (“[B]ankruptcy judges adjudicate a substantial part of the commercial law cases in this country, and their decisions guide businesses and their lawyers in structuring transactions. Thus, the initial adjudications of bankruptcy judges have a great impact on the lives of citizens.”).

297 See *supra* Parts II–III.A.

298 See generally Brubaker, *supra* note 6, at 747–48 (“The Supreme Court’s abstruseness is, of course, fuel for the scholarly engine, and bankruptcy has become the seemingly inscrutable crucible of federal jurisdiction theory.”).

299 See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 64 (1989) (preserving a jury trial right for a fraudulent conveyance defendant who has not filed proof of claim and indicating that bankruptcy courts may have power to conduct jury trials).

and the recent decision in Anna Nicole Smith's bankruptcy.³⁰⁰ These realities are, in turn, driven in large part by the exigencies of financial distress. We need to get bankruptcy work done somewhere, and the system we have—for all its conceptual anomalies—is as good as any. Bankruptcy jurisdiction may, in other words, be “exceptional” in this sense, but not necessarily “special.”

IV. SUBSTANTIVE PUZZLES; SUBSTANTIVE EXCEPTIONALISM

The preceding Part developed two structural puzzles in bankruptcy—vertical and horizontal—and suggested that they bespeak various forms of exceptionalism. Bankruptcy also creates puzzles involving the interaction between the bankruptcy power and “substantive” protections guaranteed by, among other things, the Bill of Rights. This Part catalogues three: those involving property, due process,³⁰¹ and religious liberty.

I should note at the outset that evidence of exceptionalism is weakest here. In these and other cases of clashes between the bankruptcy power and substantive constitutional protections, it is always possible that it is the constitutional protection—and not bankruptcy—that has changed over time, thus exhibiting “exceptional” tendencies for reasons having nothing to do with bankruptcy. In each case, the observations of exceptional constitutional treatment may say as much about the instability of these doctrinal categories as it does about bankruptcy's affect on them.

A. *Property*

Property is a category of rights central both to bankruptcy and to the Constitution. Much of the logic of bankruptcy is organized around property. Subject to certain exceptions not applicable here, the commencement of a bankruptcy case “creates an estate”³⁰² comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.”³⁰³ The Fifth Amendment to the Constitution, of course, protects against uncompensated “takings” of property.³⁰⁴

300 See *Marshall v. Marshall*, 547 U.S. 293, 312 (2006) (holding that a bankruptcy court has jurisdiction over a widow's claim that her stepson tortiously interfered with her expectancy of inheritance or gift from her deceased husband).

301 I recognize that “due process” is largely a procedural, not substantive, concept. I use the term “substantive” in this Part merely to distinguish this class of puzzles and exceptions from organic and structural ones discussed above.

302 11 U.S.C. § 541(a) (2000).

303 *Id.* § 541(a)(1).

304 See U.S. CONST. amend. V.

Solving property problems in bankruptcy involves three steps. First, a bankruptcy court must determine whether the rights in question would be “property” under state private law, as required by *Butner v. United States*.³⁰⁵ Thus, because the Uniform Commercial Code treats security interests under Article 9 as a species of property, so too must bankruptcy.³⁰⁶ The same may be said of real property mortgages.³⁰⁷

Second, a court must determine whether a federal bankruptcy rule impairs that interest. There seems to be little question that bankruptcy law does significantly impair property rights prospectively, although how far that may go is not clear. The automatic stay of § 362 prevents the secured creditor from foreclosing;³⁰⁸ § 363 permits a court to sell encumbered collateral free of a lien, the security interest to attach to the proceeds;³⁰⁹ § 364 empowers the bankruptcy court to grant senior liens on the collateral under certain circumstances;³¹⁰ and § 1129(b)(2) empowers a debtor to “cramdown” a plan against the objection of the secured creditor, meaning that the secured claim can be reduced to the value of the collateral and paid over an extended period of time.³¹¹

Third, and perhaps most difficult for our purposes, a court must determine whether these or other impairments offend the Takings Clause of the Constitution.³¹² Most discussions about Takings Clause protection for property interests in bankruptcy start with the cases that arose under the Frazier-Lemke Act, emergency legislation enacted during the Depression to stay foreclosures on family farms.³¹³

305 440 U.S. 48, 55 (1979) (“[P]roperty interests are created and defined by state law.”).

306 See U.C.C. § 1-201(b)(35) (2001) (“‘Security interest’ means an interest in personal property or fixtures which secures payment or performance of an obligation.”).

307 See RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 1.1 (1997) (“A mortgage is a conveyance or retention of an interest in real property as security for performance of an obligation.”).

308 See 11 U.S.C.A. § 362(a) (West 2004 & Supp. 2007).

309 See 11 U.S.C. § 363(f) (2000). This means that secured creditors may not control property prior to sale or have any direct influence on the sale.

310 See *id.* § 364(d). This section requires that the court first find that the original secured creditor is “adequately protected.” *Id.* § 364(d)(1)(B). But if the property right the creditor bargained for was first priority, and that first priority is the property interest, this may go “too far.”

311 See *id.* § 1129(b)(2). The plan must be “fair and equitable” to the secured creditor, which in this context means the creditor receives the “indubitable equivalent” of the value of the collateral. See *id.* § 1129(b)(2)(A)(iii).

312 U.S. CONST. amend. V.

313 Frazier-Lemke amended the bankruptcy law then in existence by adding subsection (s) to § 75. See Pub. L. No. 73-486, 48 Stat. 1289 (1934) (amended 1935).

Under Frazier-Lemke, farm foreclosures were halted for five years, and farmers were given the right to repurchase their farms at the appraised value, even if that may have been less than the outstanding debt secured by the farm.³¹⁴ During the stay period, farmers were required to pay a "reasonable rental" to their creditors.³¹⁵

The first case to consider the constitutionality of Frazier-Lemke, *Louisville Joint Stock Land Bank v. Radford*,³¹⁶ famously held that the stay of foreclosure without compensation effected a taking and was impermissible under the Fifth Amendment.³¹⁷ Justice Brandeis, writing for a unanimous Court on "Black Monday" (May 27, 1935, when the Court struck down two other New Deal initiatives³¹⁸), held that Frazier-Lemke violated state law property rights to retain a lien until paid, to have a judicial sale of the collateral, and to control the property while the debtor was in default.³¹⁹ "The bankruptcy power," Justice Brandeis wrote,

like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts. But the effect of the Act here complained of is not the discharge of Radford's personal obligation. It is the taking of substantive rights in specific property acquired by the Bank prior to the Act.³²⁰

If we had only *Radford* to worry about, we would be forgiven for thinking that liens are kinds of property interests that bankruptcy cannot take away, at least retroactively. However, shortly after *Radford*, Congress amended Frazier-Lemke to reduce the moratorium from five to three years and to give courts the power to lift the stay.³²¹ This, too, was challenged, in *Wright v. Vinton Branch of the Mountain Trust Bank*.³²² Here, however, the Court upheld the Act.³²³ As Professor

Frazier-Lemke expired on March 1, 1949. See Act of Apr. 21, 1948, Pub. L. No. 80-495, 62 Stat. 198.

314 See Frazier-Lemke Act, § 75(s)(7), 48 Stat. at 1291.

315 See *id.*

316 295 U.S. 555 (1935).

317 See *id.* at 601-02.

318 See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 632 (1935) (invalidating the President's power to remove a commissioner from the Federal Trade Commission); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (invalidating the National Industrial Recovery Act).

319 See *Radford*, 295 U.S. at 594-95.

320 *Id.* at 589-90 (internal footnote and citation omitted).

321 See Act of Aug. 28, 1935, Pub. L. No. 74-384, § 6, 49 Stat. 942, 944.

322 300 U.S. 440 (1937).

323 See *id.* at 470.

Ayer has noted, the difference in result may have been due to the fact that the Court had "not so much seen the light as felt the heat."³²⁴ While the changes to the Act were not wholly immaterial, "under both versions, the creditor was barred from foreclosure for long periods of time, during which the debtor remained in possession, obliged to pay over no more than what the property, after necessary expenses, would yield."³²⁵

Surveying the state of affairs as it existed in the early 1980s, Professor Rogers concluded, quite reasonably, that the belief that perfected liens were protected in bankruptcy by the Takings Clause was simply false.³²⁶ Indeed, a number of statist scholars expressly avoid characterizing liens as property interests on the theory that doing so injects an appearance of certainty and gravitas that the law in action does not support.³²⁷

Although there has been a recent tendency on the Court to take property interests more seriously,³²⁸ it is unlikely that any existing provision of the Bankruptcy Code offends the Fifth Amendment. Rather, the more interesting question involves congressional power to impair vested property interests retroactively. Here, the Court has given conflicting signals. At times, the Court seems to take the problem of retroactivity seriously. For example, in *United States v. Security Industrial Bank*,³²⁹ the Court held that retroactive avoidance of certain liens under § 522(f) of the Bankruptcy Code might have violated the Tak-

324 Ayer, *supra* note 4, at 983.

325 *Id.*

326 See Rogers, *supra* note 6, at 985 ("In context, Justice Brandeis' comments [in *Radford*] suggest that the holding of the case is only that the modification of secured creditors' rights effected by the Frazier-Lemke Act was too substantial to permit the Act to be applied retroactively. Thus, the famous statement that the bankruptcy power is subject to the fifth amendment must be taken to mean nothing more than that the fifth amendment, through either the due process or the takings clause, is the constitutional foundation for the proposition that statutes that retroactively disrupt settled expectations may be subject to particularly attentive judicial scrutiny." (footnote omitted)).

327 See, e.g., *id.* at 1020.

328 See, e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 503-04 (1998) (plurality opinion); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160 (1998); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 728 (1997); *Babbitt v. Youpee*, 519 U.S. 234, 236-37 (1997); *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 605 (1993); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987).

329 459 U.S. 70 (1982).

ings Clause.³³⁰ That section identified a class of liens—nonpossessory, nonpurchase money liens on certain types of consumer goods—that could be avoided by a consumer debtor.³³¹ The challenge involved only liens of that sort created before enactment of the Bankruptcy Code—meaning that if the liens were to be avoided, it would be because the Bankruptcy Code applied retroactively.³³²

The *Security Industrial Bank* Court had little trouble concluding that the liens would not be avoided, but the basis for the conclusion is not completely clear. On the one hand, then-Justice Rehnquist devoted a considerable amount of his discussion to the notion that “[t]he bankruptcy power is subject to the Fifth Amendment’s prohibition against taking private property.”³³³ Thus, avoidance of the liens would not be viewed as a (permissible) “regulatory” taking, but rather as “a complete destruction of the property right of the secured party.”³³⁴ Like the debtor-repurchase provisions of the Frazier-Lemke Act struck down in *Radford*, and the federal government’s attempts to prevent junior lienholders from foreclosing in *Armstrong v. United States*,³³⁵ retroactive lien avoidance would effect “[t]he total destruction by the Government of all value of these liens, which constitute compensable property, [and which have] every possible element of a Fifth Amendment taking.”³³⁶

On the other hand, the *Security Industrial Bank* opinion may really turn on judicial conventions about retroactivity, in general, and the interpretation of Congress’ intent about that in this particular case. Here, Congress made the job of determining its intent on retroactivity comparatively easy. An early version of the legislation had contained an explicit requirement that all of its provisions “shall apply in all cases or proceedings instituted after its effective date, regardless of the

330 *Id.* at 78, 82.

331 See 11 U.S.C. § 522(f)(2) (1976 & Supp. V 1981) (renumbered 11 U.S.C. § 522(f)(1)(B) by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 303, 108 Stat. 4106, 4132 (1994)).

332 *Sec. Indus. Bank*, 459 U.S. at 86.

333 *Id.* at 75 (citing *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935)).

334 *Id.*; see also *id.* at 76 (“The ‘bundle of rights’ which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple, but the Government cites no cases supporting the proposition that differences such as these relegate the secured party’s interest to something less than property.”).

335 364 U.S. 40, 46 (1962). Here, the federal government seized unfinished navy boats after default by the prime contractor and thus prohibited materialmen from enforcing their liens. *Id.* at 41. The Court held this to be a compensable taking. *Id.* at 48.

336 *Sec. Indus. Bank*, 459 U.S. at 77 (quoting *Armstrong*, 364 U.S. at 48).

occurrence of any of the operative facts determining legal rights, duties or liabilities hereunder.”³³⁷ But this provision was deleted, which the Court took to be “some evidence that it did not intend to depart from the usual principle of construction” against retroactive application.³³⁸

Security Industrial Bank’s ambiguity is captured in a key sentence that blurs the issues: “[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress.”³³⁹ This sentence starts out sounding like it means business about protecting vested property rights—“no bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted.” But Justice Rehnquist’s opinion does not stop there. Rather, he seems to recognize a caveat if the law is supported by “an explicit command from Congress.” Does this therefore mean that an explicit Congressional command under the Bankruptcy Clause *could* eliminate vested property rights?

Not surprisingly, reasonable minds appear to differ as to whether *Security Industrial Bank* really expresses a Fifth Amendment limitation on the Bankruptcy Clause.³⁴⁰ Certainly, the fact that the case was about the application of a lien avoidance provision to preexisting liens must mean that there was something special about the retroactive application of the law. The Court did not seem especially concerned about *prospective* lien avoidance, which suggests that the Fifth Amendment issue may be more about the timing of the legislation than it is about its substantive effect on property rights. This makes a certain amount of sense, as the problem of reliance is materially different depending when the new law applies. It is much harder for secured creditors to claim a taking if they acquire a lien on property having reason to know that the bankruptcy process itself may not respect that lien.

337 *Id.* at 81 (quoting H.R. 31, 94th Cong. § 10-103(a) (1st Sess. 1975), reprinted in *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. app. at 321 (1976)).

338 *Id.*

339 *Id.*

340 Compare Julia Patterson Forrester, *Bankruptcy Takings*, 51 FLA. L. REV. 851, 869 (1999) (“The Supreme Court more recently confirmed its continued support for the proposition that bankruptcy law is subject to the Takings Clause in *United States v. Security Industrial Bank*.”), with Lawrence Ponoroff, *Exemption Impairing Liens Under Bankruptcy Code Section 522(f): One Step Forward and One Step Back*, 70 U. COLO. L. REV. 1, 11 (1999) (“When finally presented with the question of whether section 522(f) violated the Fifth Amendment, the Supreme Court managed to circumvent the issue [in *United States v. Security Industrial Bank*].”).

Of course, some would say that the mere presence of a Bankruptcy Clause is fair warning that all property bets are off in bankruptcy—regardless of the effective date of the legislation. Professor Rogers observes that Justice Rehnquist's analysis in *Security Industrial Bank* ignored a history of applying bankruptcy laws retroactively:

Before the time of the *Radford* decision, the federal courts had almost invariably approached questions concerning the constitutionality of bankruptcy legislation exclusively in terms of the substantive scope of the bankruptcy power, and this analysis appears to have been regarded as an approach applicable to retroactive as well as prospective applications of the bankruptcy power and to cases involving secured creditors' rights as well as those involving unsecured creditors' rights. In fact, the cases from *In re Klein* through *Rock Island*, . . . from the perspective of the source of constitutional limitations on the substantive scope of bankruptcy legislation, all appear to have involved retroactive application of newly enacted bankruptcy legislation. Moreover, the *Canada Southern* and *Rock Island* cases both involved retroactive impairments of secured creditors' "property" rights. Yet in all of these cases, the constitutional issues were viewed solely as questions of the scope of the bankruptcy power.³⁴¹

While the cases discussed in this excerpt undoubtedly approved retroactive application of bankruptcy law, they appear not to have affected property in quite the way that concerned the *Security Industrial Bank* Court. *In re Klein* did not involve lien avoidance, but instead the grant of a discharge under the Bankruptcy Act of 1841 for a debtor who, in conformity with the Act, had ceded his property, which had been distributed to his creditors.³⁴² The impairments in both *Canada Southern*³⁴³ and *Rock Island*³⁴⁴ were retroactive, but were not lien avoidances.³⁴⁵ Rather, both involved the effectiveness of stays of foreclosure.³⁴⁶ For those like Justice Rehnquist, who believe retroactivity must stop at lien avoidance, Professor Rogers' argument may not be wholly satisfactory.

341 Rogers, *supra* note 6, at 1014–16 (footnotes omitted).

342 See *In re Klein*, 14 F. Cas. 716, 716 (C.C.D. Mo. 1843) (No. 7865).

343 *Can. S. Ry. v. Gebhard*, 109 U.S. 527 (1883).

344 *Cont'l Ill. Nat'l Bank & Trust Co. v. Chi., Rock Island & Pac. Ry. (Rock Island)*, 294 U.S. 648 (1935).

345 See *id.* at 663 n.4.; *Can. S. Ry.*, 109 U.S. at 530–32.

346 In *Rock Island*, the stay was temporary, pending plan confirmation. See *Rock Island*, 294 U.S. at 663. In *Canada Southern*, the injunction was approved by an act of the Canadian Parliament, which was considered binding by the Court. See *Can. S. Ry.*, 109 U.S. at 536.

That said, there is in fact support for the view that Congress may retroactively disturb vested property rights, although it may have to pay just compensation for doing so. In the *Regional Rail Reorganization Act Cases (The 3R Act Cases)*,³⁴⁷ the major creditors and a stockholder of the Penn Central Railroad challenged the constitutionality of the Regional Railroad Reorganization Act of 1973 ("Rail Act"), and alleged that the conveyance of railroad properties to Conrail and the mandatory continuation of money-losing rail services effected a taking under the Fifth Amendment.³⁴⁸ The Court held that the reorganization plan, which forced the creditors to accept stock in an insolvent successor (Conrail), did not constitute an impermissible taking, since the plaintiffs were effectively entitled to indemnification by the federal government under the Tucker Act.³⁴⁹

The key point in the *3R Act Cases* is that the Rail Act *did* effect a taking.³⁵⁰ But, the taking was constitutionally permissible because it was compensated by the federal government:

We hold . . . that while the conveyance provisions of the Rail Act might raise serious constitutional questions if a Tucker Act suit were precluded, the availability of the Tucker Act guarantees an adequate remedy at law for any taking which might occur as a result of the final-conveyance provisions. Further, with the Tucker Act remedy, the payment of "fair and equitable consideration" in compliance with the reorganization statutes is assured, and procedural due process is satisfied.³⁵¹

The idea that property may form the outer boundary of the bankruptcy power is attractive but ultimately problematic. It is attractive because, unlike in personam rights that can be discharged with little controversy, property is ostensibly an in rem right protected by the Fifth Amendment. Coming after the Bankruptcy Clause in the text, one might think that, whatever other private rights Congress may

347 419 U.S. 102 (1974).

348 The takings challenge asserted that the Rail Act was effectively an eminent domain statute and, because compensation was not in cash but largely in stock of a successor entity (Conrail), necessarily worked an unconstitutional taking. *See id.* at 137.

349 The Tucker Act confers jurisdiction on the Court of Claims to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (2000).

350 *Cf. The 3R Act Cases*, 419 U.S. at 148–50.

351 *Id.* at 149.

trample under the bankruptcy power, the Framers of the Bill of Rights have told us that property is not among them.

Yet, this conventional wisdom is only as good as our understanding of property. A discussion of the nature of property is obviously well beyond the scope of this Article. It is, however, no secret that property is a juridical concept whose meaning and force have long been contested, and which remains in flux. If we do not know what constitutes property under state private law, then saying that it forms the limit of the bankruptcy power may tell us very little.

Moreover, this fails to account for two ways that bankruptcy exceptionalism creeps into the treatment of property. First, even if bankruptcy treats property interests more seriously than other entitlements, it nevertheless has a way of diluting and distorting those rights in significant ways. The powers to stay foreclosure, to assume or reject leases and licenses, to sell encumbered property and to “cram” a lien down, among others, alter property rights in very significant ways. At the end of the day, bankruptcy lawyers take some comfort in the idea that the holder of property rights gets the “indubitable equivalent” value of the property, at least if the property is a lien.³⁵² But all this really means is that the lien holder probably gets more cash than if it had only a contract claim.

Second, it forces us to confront the exceptionalism implicit in the *in terrorem* conception of the Bankruptcy Clause. It is unlikely that a democratically elected Congress can negate prospectively or retrospectively all property interests in bankruptcy. But how far Congress can go—and how far is “too far”³⁵³—has yet to be determined, although there will likely be mounting pressure to find out. The greatest pressure will involve retroactive relief. If, for example, the Bankruptcy Clause does create the kind of *in terrorem* power described in Part II.B, it may be that the Framers actually *did* intend to permit retroactive elimination of vested property rights such as liens. As we have seen, this may have been the case with one iteration of South Carolina’s colonial bankruptcy law.³⁵⁴ A democratically elected Congress would, on this view, have the power under the Bankruptcy

352 This phrase is codified in § 1129 of the Bankruptcy Code, and derived originally from Judge Learned Hand’s opinion in *In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d Cir. 1935). See 11 U.S.C. § 1129(b)(2)(A)(iii) (2000 & Supp. V 2005); S. Rep. No. 95-989, at 127 (1978) (“The indubitable equivalent language [in § 1129(b)(2)(A)(iii)] is intended to follow the strict approach taken by Judge Learned Hand in *In re Murel Holding Corp.*” (citation omitted)).

353 Cf. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1982) (“[I]f regulation goes too far it will be recognized as a taking.”).

354 See *supra* notes 115–20 and accompanying text

Clause to enact legislation to address serious existing financial crises, even if that meant upsetting vested property rights to some extent.

If so, a court's task in reviewing retroactive bankruptcy legislation would be to weigh the severity of the financial crisis that led Congress to act against the violence its use of the bankruptcy power does to vested property rights. On this analysis, the *Radford* case might come out differently, but *Security Industrial Bank* might come out the same. In *Radford*, the Court struck down legislation enacted in the face of the Depression, which most would agree was a serious crisis. By contrast, no similar crisis confronted Congress when it enacted § 522(f), which was struck down in *Security Industrial Bank*. *Wright's* ultimate acceptance of a modified form of the Frazier-Lemke Act may be evidence that the Court in fact is willing to engage in this sort of balancing analysis.³⁵⁵ If so, we may find that bankruptcy permits greater adjustments of property rights than other constitutional powers.

B. Due Process

A recurrent constitutional problem in bankruptcy involves due process, the protection provided under the Fifth Amendment to some sort of notice and hearing before rights can be taken away.³⁵⁶ In most bankruptcy cases, due process is not a large issue. Although the automatic stay of debt collection and the discharge of debt require no actual notice to creditors, there is little question that bankruptcy's basic operations pass procedural muster.

The big due process problems generally arise in mass tort bankruptcy cases. Companies such as the Dow Corning Corporation,³⁵⁷ the A.H. Robins Company,³⁵⁸ and countless asbestos manufacturers³⁵⁹

355 See *supra* notes 322–23 and accompanying text.

356 U.S. CONST. amend. V; see also *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”).

357 See *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn.* (*In re Dow Corning Corp.*), 86 F.3d 482, 485–87 (6th Cir. 1996) (providing the factual and procedural background of the breast implant litigation); *In re Dow Corning Corp.*, No. 95-20512, 1995 Bankr. LEXIS 1123, at *1–2 (Bankr. E.D. Mich. Aug. 9, 1995) (discussing the Dow Corning bankruptcy, which resulted from litigation over breast implants); see also Marcus Cole, *Limiting Liability Through Bankruptcy*, 70 U. CIN. L. REV. 1245, 1271–74 (2002) (describing the *In re Dow Corning* litigation).

358 *In re A.H. Robins Co.*, 880 F.2d 694, 700 (4th Cir. 1989); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1008 (4th Cir. 1986); Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, LAW & CONTEMP. PROBS., Autumn 1990, at 79, 103–04; Georgene M. Vairo, *Georgene, The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims*

have all discharged mass tort liability in Chapter 11 reorganizations. Although the answers are complex, the due process questions are simple: how much notice should be given, to what end, and how much dignitary face time in court should future claimants enjoy?

For those creditors who have already sued, or for whom the injury is manifest, there is a general sense that notice by publication and the like will suffice. The problem is that these cases seek to discharge liability for all "claims" that exist as of the commencement of the bankruptcy, and the term "claim" is defined very broadly, to include those that may be contingent, disputed, unliquidated, or unmat-ured.³⁶⁰ In other words, the mass tort bankruptcy seeks to discharge both actual *and* latent claims. But latency means that in many cases, the victim-creditor will not know that that he or she in fact has an injury. Thus, no amount of notice could be meaningful.

The complex mechanism we have developed to address these sorts of claims is the "channeling injunction." This is an injunction that supplements the general discharge granted in a reorganization plan under Chapter 11. The rules on channeling injunctions are contained in Bankruptcy Code § 524(g).³⁶¹ They are highly complex, although the basic idea is that "future" claimants—meaning those who have claims that were latent when the debtor went into bank-ruptcy—can only recover for their injuries through a trust funded by

Resolution, 31 LOY. L.A. L. REV. 79, 129 (1997); Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 629–30 (1992). See generally S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS 187–217 (2000) (summarizing the A.H. Robins Co. Dalkon Shield litigation); RICHARD B. SOBOLEW, BENDING THE LAW (1991) (same).

359 Scores, if not hundreds, of companies are affected by potential liability for asbestos exposure, and many have commenced bankruptcy cases to manage that liability. See STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT, at vi–vii (2002) (estimating that by the end of 2000, 600,000 people had filed claims naming over 6000 companies as defendants, and \$54 billion had been spent on litigation); Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203, 205 (2003); Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. CIN. L. REV. 1319, 1322 (2002); see also, e.g., Findley v. Blinken (*In re* Joint E. & S. Dist. Asbestos Litig.), 982 F.2d 721, 753 (2d Cir. 1992); Kane v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 843 F.2d 636, 639 (2d Cir. 1988); *In re* Armstrong World Indus., 320 B.R. 523, 524–25 (D. Del. 2005).

360 11 U.S.C.A. § 101(5) (West 2004 & Supp. 2007).

361 11 U.S.C. § 524(g) (2000).

the debtor as part of its reorganization plan. Their claims are “channeled” to, and paid from, the trust.³⁶²

We can see how exceptional bankruptcy is when we contrast it with the rules that would govern the settlement of mass tort class actions outside bankruptcy. Settlements under the Federal Rules of Civil Procedure embed a variety of procedural protections for class actions, including that “the claims . . . of the representative parties [must be] typical of the claims . . . of the class” and “the representative parties [must] fairly and adequately protect the interests of the class.”³⁶³ Two recent cases, *Amchem Products, Inc. v. Windsor*³⁶⁴ and *Ortiz v. Fibreboard Corp.*,³⁶⁵ interpret these standards quite stringently, making the settlement of mass torts in class action litigation much more difficult.³⁶⁶

The Bankruptcy Code, by contrast, gives debtors (or other plan proponents) significant discretion in classifying claims. Under Bankruptcy Code § 1122(a) “a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.”³⁶⁷ Bankruptcy has thus become an even more attractive medium through which to discharge mass tort liability.

We know that bankruptcy’s looser standards are acceptable because *Ortiz* embraces a kind of bankruptcy exceptionalism. The Court cites bankruptcy as an example of an exceptional situation involving a “special remedial scheme” that permissibly “‘foreclos[es] successive litigation by nonlitigants.’”³⁶⁸ The “protections for credi-

362 See, e.g., Katherine M. Anand, Note, *Demanding Due Process: The Constitutionality of the § 524 Channeling Injunction and Trust Mechanisms That Effectively Discharge Asbestos Claims in Chapter 11 Reorganization*, 80 NOTRE DAME L. REV. 1187, 1194–97 (2005) (discussing the adoption of § 524 in response to difficulties with Chapter 11 reorganization in asbestos cases).

363 FED. R. CIV. P. 23(a).

364 521 U.S. 591 (1997).

365 527 U.S. 815 (1999).

366 See *id.* at 821 (“We hold that applicants for contested [class] certification on [a limited fund theory] must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interest of class members.”); *Amchem*, 521 U.S. at 628 (“[W]e have concluded that the class in this case cannot satisfy [Rule 23’s] requirements of common issue predominance and adequacy of representation . . .”).

367 11 U.S.C. § 1122(a) (2000).

368 *Ortiz*, 527 U.S. at 846 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989)). In *Martin v. Wilks*, the Court had noted that bankruptcy and probate are examples of “legal proceedings [that] may terminate preexisting rights [of nonlitigants] if the scheme is otherwise consistent with due process.” *Martin*, 490 U.S. at 762 n.2.

tors built into the Bankruptcy Code”³⁶⁹ were somehow greater than the “‘structural assurance of fair and adequate representation for the diverse groups and individuals affected’” by the *Amchem* and *Ortiz* settlements.³⁷⁰ Thus, as Professor Gibson has observed, “the Court’s view may be that bankruptcy differs from class actions in significant respects that render inapplicable the strict classification requirements that due process may otherwise require for class action certification.”³⁷¹ This, however, would simply be another way of saying that bankruptcy may be an exception to received notions of due process.

C. Religious Liberty

A third source of conflict between the bankruptcy power and substantive civil liberties involves religious freedom. The First Amendment of the Constitution is the source of protection for religious liberty, providing that neither federal nor state governments may make any law “respecting an establishment of religion, or prohibiting the free exercise thereof.”³⁷² Although problems involving religious liberty in bankruptcy are not likely as common as those involving property and due process, they appear to be increasing in frequency and difficulty.

The principal current examples involve the Catholic diocese bankruptcy cases. As is well known, many dioceses have incurred significant liability, through judgment or settlement, for sexual misconduct by priests.³⁷³ As of this writing, the most recent filing was by the Diocese of San Diego which listed assets and liabilities in excess of \$100 million.³⁷⁴

A central question is whether religious liberty principles, as expressed through the First Amendment, or statutory supplements such as the Religious Freedom Restoration Act (RFRA),³⁷⁵ prevent a bankruptcy court from displacing diocesan management by

369 *Ortiz*, 527 U.S. at 860 n.34.

370 *Id.* at 856 (quoting *Amchem*, 521 U.S. at 627).

371 S. Elizabeth Gibson, *A Response to Professor Resnick: Will This Vehicle Pass Inspection?*, 148 U. PA. L. REV. 2095, 2109 (2000).

372 U.S. CONST. amend. I.

373 The factual background to the scandal can be found in archives maintained by The Poynter Institute and the National Catholic Reporter. See Abuse Tracker, <http://www.bishop-accountability.org/AbuseTracker> (last visited Jan. 9, 2008); Poynter Online—Abuse Tracker, <http://poynter.org/column.asp?id=46> (last visited Jan. 9, 2008). See generally Lipson, *Churches*, *supra* note 6 (describing the background of certain diocesan bankruptcy cases).

374 See Moran, *supra* note 33.

375 See Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (2000), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

appointing a Chapter 11 trustee. There is support for the proposition that RFRA may defeat application of the Bankruptcy Code, and thus prevent a bankruptcy court from dislodging management, even if in violation of the Bankruptcy Code.³⁷⁶ In *In re Young*, the United States Court of Appeals for the Eighth Circuit found that RFRA trumped § 548 of the Bankruptcy Code—the constructive fraudulent conveyance provisions.³⁷⁷ There is no obvious reason why RFRA would not also apply to Bankruptcy Code §§ 1104 and 1106, which govern the appointment of trustees to displace management, and the duties of management when acting as debtor-in-possession.³⁷⁸

We also know that RFRA presented a serious question in the case of the Portland Diocese. There, tort claimants sought declarations that parish property belonged to the debtor's estate and that any unrecorded trusts for the benefit of parishioners should be avoided under § 544(a)(3) of the Bankruptcy Code.³⁷⁹ Judge Perris held that avoidance of these unrecorded interests might create a substantial burden on parishioners' exercise of religion under RFRA: "[I]f application of [the Bankruptcy Code] leaves the parishioners and school children with no place to worship and study, because no facilities are available, and if they establish that worship and study are central to religious doctrine, the burden [on their exercise of religion] could be substantial."³⁸⁰

Yet, if history is any guide, the Court may not care whether bankruptcy burdens religious exercise. The important example here involves the experience of the Church of Latter-Day Saints (LDS) in the late nineteenth century, where the federal government engaged

376 RFRA's stated purposes are:

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id. § 2000bb(b) (internal citations omitted).

377 See *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1420 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997).

378 See 11 U.S.C.A. §§ 1104 & 1106 (West 2004 & Supp. 2007).

379 See *Tort Claimants Comm. v. Roman Catholic Archbishop (In re Roman Catholic Archbishop of Portland in Or.)*, 335 B.R. 868, 875–76 (Bankr. D. Or. 2005).

380 See *Tort Claimants Comm. v. Roman Catholic Archbishop (In re Roman Catholic Archbishop of Portland in Or.)*, 335 B.R. 842, 864 (Bankr. D. Or. 2005); see also *id.* at 863 ("The possibility that the result of [avoidance of these interests] could be the loss of all parish church and Archdiocesan school properties titled in [the] debtor's name raises a question of fact regarding whether application of § 544(a)(3) would impose a substantial burden on the parishioners' exercise of religion.").

in a relentless battle to outlaw the "barbarous" practice of plural marriage.³⁸¹ In *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,³⁸² the LDS challenged federal legislation that dissolved the church corporation, appointed a federal equity receiver, and caused the church's property to escheat to the federal government, a process similar to involuntary bankruptcy under current law, but with the proceeds going to the government rather than creditors.³⁸³ The LDS objected to the legislation on, among others, religious liberty grounds.³⁸⁴ The Supreme Court was wholly unmoved by their concerns:

It is distinctly stated in the pleadings and findings of fact, that the property of the [church] corporation was held for the purpose of religious and charitable uses. But it is also stated in the findings of fact, and is a matter of public notoriety, that the religious and charitable uses intended to be subserved and promoted are the inculcation and spread of the doctrines and usages of the Mormon Church, or Church of Latter-Day Saints, one of the distinguishing features of which is the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. Notwithstanding the stringent laws which have been passed by Congress—notwithstanding all the efforts made to suppress this barbarous practice—the sect . . . perseveres, in defiance of law, in preaching, upholding, promoting and defending it.³⁸⁵

Not surprisingly, the *Latter-Day Saints* case and its progeny are often held up as examples of the worst disingenuity in our thinking about religious liberty.³⁸⁶ These are exceedingly ugly decisions, which

³⁸¹ *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890).

³⁸² 136 U.S. 1.

³⁸³ *Id.* at 8–10. In 1862, Congress enacted legislation to "annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy." Act of July 1, 1862, ch. 126, § 2, 12 Stat. 501, 501 (repealed 1910). Congress recruited debtor-creditor law in its effort, providing in the 1862 legislation that

[i]t shall not be lawful for any corporation or association for religious or charitable purposes to acquire or hold real estate in any Territory of the United States during the existence of the territorial government of a greater value than fifty thousand dollars; and all real estate acquired or held by any such corporation or association contrary to the provisions of this act shall be forfeited and escheat to the United States: *Provided*, That existing vested rights in real estate shall not be impaired by the provisions of this section.

Id. § 3, 12 Stat. at 501–02.

³⁸⁴ *Latter-Day Saints*, 136 U.S. at 10–12.

³⁸⁵ *Id.* at 48–49.

³⁸⁶ See Lipson, *Churches*, *supra* note 6, at 412. Related cases include *Davis v. Beason*, 133 U.S. 333, 347–48 (1890) (upholding a law requiring Mormons to swear

many would probably rather deny than defend.³⁸⁷ Yet, they remain “good” law in the sense that people like Justice Scalia cite them as precedent when denying religious liberty protections.³⁸⁸

The parallels are disturbing. Like *Latter-Day Saints* and its siblings, the diocesan cases harness economic restructuring to remedy perceived sexual misconduct by religious actors or institutions. If a variant of bankruptcy—involuntary, highly selective bankruptcy, no less—can be used to reform the LDS, why should Catholic dioceses be any different? Perhaps the Mormon experience is further evidence that bankruptcy, or its analogues, have the potential to generate exceptions to constitutional rules, standards, norms, and values.

V. TOWARDS A CONSTITUTIONAL THEORY OF BANKRUPTCY

The prior three Parts developed evidence that in many contexts, and in many different ways, bankruptcy has the capacity to create exceptions to generally accepted constitutional rules, standards, norms, and values. Exceptionalism may thus be an operating principle behind the constitutional puzzles of bankruptcy. But exceptionalism is not a constitutional theory; it is a description of what appears to be happening, not a statement of what should be happening, or why. Nor can it tell us when, exactly, exceptions should be made. When Congress or a judge feels like it? When we (whoever “we” may be) like the result?

This Part has three goals. First, it distinguishes the descriptive exceptionalism we have seen from a prescriptive or normative case for exceptionalism that might be made. I argue that there is an understandable reluctance to embrace bankruptcy exceptionalism. The next two subparts offer thoughts on how to contain this exceptionalism within credible constitutional tolerances.

they were not polygamists), *abrogated by* *Romer v. Evans*, 517 U.S. 620 (1996), and *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (holding that the practice of polygamy was not protected by the Free Exercise Clause).

387 Edward Gaffney, Jr., Dean of the Valparaiso University School of Law, described the treatment of the LDS as akin to “the sort of dictatorial rule that one associates with Henry VIII’s dissolution of the monasteries in sixteenth century England, not with the spirit of the First Amendment.” See *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 153 (1992) (statement of Edward McGlynn Gaffney, Jr., Dean, Valparaiso School of Law) (citation omitted).

388 See *Employment Div. v. Smith*, 494 U.S. 872, 885, 890 (1990) (citing *Reynolds* and holding that the Free Exercise Clause creates no exemptions from “neutral” laws of general application).

A. *Descriptive v. Prescriptive Exceptionalism*

While bankruptcy may in fact have been accorded exceptional constitutional treatment in a number of circumstances, this is not to say that it should. There is a world of difference between descriptive exceptionalism and normative exceptionalism. Many would disavow either form of exceptionalism. The Supreme Court would appear to be reluctant to acknowledge those features of bankruptcy that are exceptional. According to the *Northern Pipeline* plurality, for example, bankruptcy was not one of the "exceptional powers bestowed upon Congress by the Constitution or by historical consensus" that would justify deviation from the "categorical" approach to Article III powers it envisioned.³⁸⁹ Similarly, Ralph Brubaker has argued that we should have "extreme skepticism" for "widespread (but troublesome) 'bankruptcy is different' instincts."³⁹⁰ Brubaker has

discovered time and time again that bankruptcy is not *sui generis*. Although the bankruptcy process is inherently more complex than most general civil litigation, breaking down that complex process into its constituent elements consistently reveals that the federal bankruptcy process is best understood and explained in the same fashion as all other aspects of federal jurisdiction and procedure, using conventional federal jurisdiction theory. Thus, the limits on federal bankruptcy jurisdiction should also come from the limits generally applicable to the federal courts. If those limits come from nowhere other than the constitutional limits of the Bankruptcy Power itself, there is good reason to fear that there are no meaningful limits on federal bankruptcy jurisdiction.³⁹¹

The desire to fit bankruptcy smoothly into the larger existing jurisdictional—and constitutional—framework is understandable. It is discomfiting to think that bankruptcy is different. If it is different it may, for example, be inferior—which, as discussed in Part III.B above, is effectively how its practice was treated from enactment of the Chandler Act in 1938 to the 1978 Bankruptcy Code.³⁹² The 1978 Act

389 *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (plurality opinion); see also *id.* at 71 ("We discern no such exceptional grant of power applicable in the cases before us."); cf. *Ashton v. Cameron County Water Improvement Dist. No. One*, 298 U.S. 513, 538 (1936) (Cardozo, J., dissenting) ("To read into the bankruptcy clause an exception or proviso to the effect that there shall be no disturbance of the federal framework by any bankruptcy proceeding is to do no more than has been done already with reference to the power of taxation by decisions known of all men.").

390 Brubaker, *supra* note 160, at 97.

391 *Id.* at 133–34.

392 SKEEL, *supra* note 266, at 132–36.

was generally viewed as successful in part because it professionalized and dignified bankruptcy practice.³⁹³

But Professor Brubaker's concerns about exceptionalism confuse the normative and the descriptive. As noted in the Introduction, we do not generally find bankruptcy in other nations' constitutions.³⁹⁴ It strains credulity to say that bankruptcy jurisdiction has been treated like other matters of federal jurisdiction. It would, for example, be exceedingly difficult to draw a straight line starting at *Seminole Tribe*, through *Alden*, and ending at *Katz*. Even Brubaker grudgingly acknowledges that *Katz* may be "an indication that bankruptcy is somehow intrinsically different from Congress's other Article I powers."³⁹⁵ Nor is it possible to identify any other federal judicial officer that manages the complex mix of state and federal, public and private, administrative and judicial matters addressed by bankruptcy judges. Nor can we say with great confidence that property, due process, and religious liberty all get the same treatment in bankruptcy as out. While we may *want* to cabin the bankruptcy power within received constitutional doctrine, the facts would seem to point in a different direction thus far.

The ultimate question about bankruptcy exceptionalism is, as suggested by Professor Lessig, whether it is constitutionally "senseless."³⁹⁶ The answer, I think, is largely "no." Exceptionalism certainly implies a potential to be senseless—what meta-rules determine the exceptions? Nevertheless, the exigent nature of financial distress makes sensible the expansive interpretations we have generally given to the bankruptcy power. Because financial failure is the exception rather than the norm, our approach to bankruptcy sensibly (if unwittingly) tolerates (and perhaps seeks) exceptional treatment to the constitutional ordering that underpins the state private law which generally governs in the absence of distress. Bankruptcy exceptionalism makes sense because our system needs a larger way to manage failure in the presence of competing constitutional rules, standards, norms, and values.

Professor Brubaker is understandably concerned about the ad hocery that could follow from bounding the bankruptcy power solely with the word "bankruptcies."³⁹⁷ As we have seen, Chief Justice Marshall in *Sturges* observed that Congress had broad discretion to define

393 See *supra* notes 267–71 and accompanying text.

394 See *supra* note 8.

395 Brubaker, *supra* note 160, at 97.

396 See *supra* notes 79–83 and accompanying text.

397 Brubaker, *supra* note 160, at 131–34.

the term.³⁹⁸ Taking his lead, no one then or now seriously argues that the term should today bear its (probable) original meaning. But just because we have expanded our understanding of the meaning and role of bankruptcy does not mean bankruptcy creates unlimited federal power. The bankruptcy power most assuredly has constitutional content—and constitutional boundaries—which can, in turn, help to limit the exceptionalism we have seen thus far. The important question is how to define the boundaries, thus assuring that bankruptcy remains constitutionally sensible.

B. *The Public-Private Continuum*

One way to understand the boundaries of bankruptcy is to recognize its unusual—perhaps unique—point on the public-private continuum. The idea that there is a continuum—and thus a distinction—between “public” and “private” rights is not new, but is also somewhat contested. The distinction is most frequently associated with the “state action” doctrine, which has not necessarily been well received.³⁹⁹ The distinction appears across constitutional and regulatory categories.⁴⁰⁰ We do not need to come to any conclusions about the strength of the distinction to recognize that bankruptcy presents a highly complex mix of public and private rights. As discussed in Part III.B above, many features of bankruptcy clearly involve “private” rights, many do not. Although *Northern Pipeline* did not purport to resolve the question for all time, the plurality opinion certainly

398 See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 195 (1819) (noting that the bankruptcy power “is, like every other part of the subject, one on which the legislature may exercise an extensive discretion”).

399 Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 95 (1967) (calling the state action case law “a conceptual disaster area,” which “has the flavor of a torchless search for a way out of a damp echoing cave”).

400 See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 480–90 (2005) (deciding whether a particular use of a city’s eminent domain power was for a permissible “public” purpose under the Takings Clause); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001) (asking whether on-campus religious conduct violates the First Amendment by inquiring whether the conduct was genuinely that of the school or merely of the private group, and whether the community would be “confused” as to whether the school endorsed the Christian religion); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (noting in dicta that tolerance of private speech endorsing religion is to be distinguished from government speech endorsing it); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–21 (1984) (setting out a continuum of degrees of “privacy” within “private” associations, ranging from the family (most private) to for-profit entities (least private), to be used as a test for measuring the degree of a plaintiff’s First Amendment “right of association” in a given context).

seemed to recognize the hybrid nature of bankruptcy in this regard.⁴⁰¹

The complex relationship between public and private is central not only to jurisdictional questions, but is also in the background of the bankruptcy theory continuum discussed in Part I. Recall that the proceduralist position would treat bankruptcy law as largely a procedural mechanism for managing substantive rights determined by state private law. Statists, by contrast, would tolerate a far greater degree of public intrusion into the bankruptcy process. Recall also that neither side can tell us much about what a constitutional theory of bankruptcy should look like. Proceduralists will tend to assume that state private law rules solve most problems, but cannot tell us what to do if the Constitution creates, protects or alters those entitlements. Statists, by contrast, would tell us that bankruptcy policy can adjust prebankruptcy entitlements, but cannot tell us where the stopping point is, or what larger set of values should guide conflicts between the bankruptcy power and other constitutional rules, standards, norms, and values.

The irony here is that the public-private features of the bankruptcy theory continuum share certain features with one of our most important constitutional cases on the public-private distinction, *Lochner v. New York*.⁴⁰² As is familiar, the *Lochner* Court struck New York's maximum hour law, reasoning that the right to contract was a "liberty" interest protected by the Fourteenth Amendment, with which the state could not interfere.⁴⁰³ The majority observed that "the limit of the police power has been reached and passed in this case" because the law was not supported by a sufficiently compelling state interest: the health of bakers was not sufficiently important and/or threatened by unregulated hours as to require state interference with the employer-employee contract.⁴⁰⁴ *Lochner*, therefore, viewed the status quo—the private right to enter into contracts—as a "neutral" condition with which the state could not interfere absent a compelling reason.

401 See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion) ("[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a 'public right,' but the latter obviously is not.").

402 198 U.S. 45 (1905).

403 See *id.* at 57–58.

404 *Id.* at 58.

Cass Sunstein has argued that *Lochner* stands for, among other things, a certain view of “neutrality” and “baselines” in law.⁴⁰⁵ “For the *Lochner* Court, neutrality, understood in a particular way, was a constitutional requirement.”⁴⁰⁶ Chief among the requirements of neutrality was legislative deference to the common law, the “natural” source of legal and economic order.⁴⁰⁷ Under *Lochner* “the existing distribution of wealth is seen as natural, and [legislative] failure to act is seen as no decision at all. . . . [F]or constitutional purposes, the existing distribution of wealth must be taken as simply ‘there,’ and . . . efforts to change that distribution are impermissible.”⁴⁰⁸

The bankruptcy theory continuum maps onto discussions about the public-private continuum as articulated by *Lochner*. The neutrality of contract identified by Sunstein is similar (although hardly identical) to the “prebankruptcy entitlement” of the proceduralist creditors’ bargain. In both cases, we are told that the operative law simply exists, devoid of political context, and—more importantly—resistant to political (majority) will as expressed through legislation (New York’s wage and hour laws or Congress’ Bankruptcy Code). Proceduralists have not, of course, argued that *Lochner*, or, for that matter, the Bankruptcy Clause, compels the creditors’ bargain. Nor, for the most part, do they argue that the Constitution prevents Congress from altering these entitlements. Rather, they make their appeal based on normative assertions about what a better system might look like. But the end result would be the same: loss allocations that would be determined by a baseline set of private ordering rules that bankruptcy legislation should not alter.

For their part, statists would latch onto Holmes’ positivist dissent. Loss allocation rules are as much Congress’ business as protecting bakers was the business of the New York legislature. “I strongly believe,” Holmes wrote,

that my agreement or disagreement [with New York policy] has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples.⁴⁰⁹

405 See Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 873–74 (1987).

406 *Id.* at 874.

407 See *id.* at 879.

408 *Id.* at 884.

409 *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

To statist, bankruptcy is an essentially political question which the Bankruptcy Clause has given Congress the power to answer virtually any way it chooses. The answers may be messy or ugly or contrary to what sound judges—or law professors—may want (in short, what many would say of BAPCPA). But the option is the ballot box, not the bench.

The competing positions of proceduralists and statist, like the competing positions in *Lochner*, are fights over where on the public-private continuum a particular power (bankruptcy) should reside and what Congress may do with that power. While there is good reason to respect state private law in bankruptcy, it is important to remember that, for at least four reasons, bankruptcy has an important public dimension.

First, as explained in Part III, bankruptcy is—and, *Northern Pipeline* suggests, to some extent must be—conducted in courts, which are public fora.⁴¹⁰ Among the consequences of a court-based bankruptcy system is the fact that disclosures by the parties are presumptively public. One of the looming constitutional fights in BAPCPA will be over debtors' obligations to produce income tax returns and other private information.⁴¹¹ In the business context, we see fights about the media's access to sensitive information about corporate debtors.⁴¹² An administrative bankruptcy model might do a better job of maintaining privacy than one lodged in courts. But if *Northern Pipeline* means that disputes involving state private law require resolution by an Article III judge, and the work of those judges is presumptively public, then to this extent bankruptcy will be a public proceeding.

Second, bankruptcy courts have in certain respects been proxies for regulators of large segments of the economy. When Congress began the process of deregulating the airline industry in 1978, for example, we might have believed that government's role would diminish.⁴¹³ It obviously did in some respects; but in many respects, deregulation simply shifted oversight from one public forum, the Civil

410 *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84–87 (1982) (plurality opinion) (striking down the jurisdictional grant of the 1978 Bankruptcy Act).

411 11 U.S.C.A. § 521(e)(2)(A) (West Supp. 2007).

412 See *In re Alterra Healthcare Corp.*, 353 B.R. 66, 73–74 (Bankr. D. Del. 2006) (discussing a newspaper's First Amendment right to access sealed information about debtor settlements).

413 Control of airline price structure and other matters was vested in the Civil Aeronautics Board until 1978, when these matters were deregulated in the Airline Deregulation Act. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended in scattered sections of 49 U.S.C.).

Aeronautics Board, to another—bankruptcy courts. Similar observations can be made about the railroads, most of which, when in private hands, went through bankruptcy or its federal equity receivership forerunner.⁴¹⁴ The *3R Act Cases*, discussed in Part IV.A above, address just one of scores, if not hundreds, of railroad reorganizations managed by the judiciary.⁴¹⁵

Third, we know that many of our early debt crises involved not private obligations, but public ones. “[A]t the adoption of the constitution,” Chief Justice Marshall explained in *Cohens v. Virginia*,⁴¹⁶ “all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general . . .”⁴¹⁷ Indeed, as discussed in Part III.A above, private suits to recover these public debts led to the adoption of the Eleventh Amendment. While these decisions and crises did not specifically involve the bankruptcy power, they bespeak the public nature of financial distress. When the government could not pay, private debt holders held worthless paper, corroding the chain of financial and economic relations. Along that chain would be debtors and creditors for whom Congress, using the bankruptcy power, could alter private arrangements.

Finally, and perhaps most importantly, we can see that the ultimate power in bankruptcy—the discharge of debt—is the conversion of what is usually a “private” right (a debt claim) into a public one—a permanent injunction against its enforcement. As part of the “core” of the bankruptcy power, the *Northern Pipeline* Court appears to have viewed the discharge as a “public” right:

Appellants argue that a discharge in bankruptcy is indeed a “public right,” similar to such congressionally created benefits as “radio station licenses, pilot licenses, or certificates for common carriers” granted by administrative agencies. But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a “public right,” but the latter obviously is not.⁴¹⁸

414 Railroad receivership is discussed further *infra* Part V.C.

415 See SKEEL, *supra* note 266, at 48–70.

416 19 U.S. (6 Wheat.) 264 (1821).

417 *Id.* at 406.

418 *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion) (citation omitted).

Which takes us back to *Lochner*. *Lochner* does not just resemble the existing bankruptcy debate. It also hints at a solution, at least if we want to make progress in understanding the constitutional contours of bankruptcy. Justice Peckham's majority opinion did not say that contract was an absolute right with which a state could never interfere under its police power. Rather, private rights would give way in certain special (what the Court called "border"⁴¹⁹) cases, such as *Holden v. Hardy*,⁴²⁰ where state action could interfere with labor contracts.⁴²¹ The limitation in *Holden* was tolerable because of the unusual nature of the contract and limitation in question: the workers were not bakers, but miners and smelters, whose working conditions made them more vulnerable to predation by their employers, and thus more dependent upon the state for protection.⁴²²

We can extrapolate from this a more general theory of exigency which says that state action will be tolerable even to the most *Lochnerian* of courts if it addresses a sufficiently emergent problem. Some market actors—miners—may be placed in positions of disadvantage that warrant state protection. We will make exceptions for them from whatever the prevailing constitutional wisdom might be because of their vulnerability. Perhaps, like *Holden*, bankruptcy policy—and the bankruptcy power—should reflect exceptions to constitutional rules, standards, norms, and values when bankruptcy law more closely resembles the protections for miners in *Holden* than for the bakers in *Lochner*.

Lochner's limiting principle of public rights—credible vulnerability—tracks our earliest views of the bankruptcy power. Recall that as originally conceived, the discharge was to be available only to the "honest but unfortunate" debtor.⁴²³ The bankruptcy discharge would be appropriate, in Justice Story's words, "to relieve the unfortunate and meritorious debtor from a slavery of mind and body, which cuts him off from a fair enjoyment of the common benefits of society."⁴²⁴ Although we have developed complex (and, some would say, ineffective) mechanisms for sorting the deserving from the undeserving debtor, this idealized vision of the debtor who has incurred losses

419 *Lochner v. New York*, 198 U.S. 45, 54 (1905).

420 169 U.S. 366 (1898).

421 *Lochner*, 198 U.S. at 54 (citing *Holden*, 169 U.S. 366).

422 *Id.* ("It was held [in *Holden*] that the kind of employment, mining, smelting, etc., and the character of the employés in such kinds of labor, were such as to make it reasonable and proper for the State to interfere to prevent the employés from being constrained by the rules laid down by the proprietors in regard to labor.").

423 See *supra* note 29 and accompanying text.

424 3 STORY, *supra* note 92, § 1107, at 6.

through no fault of her own has been at the core of the public purpose of the Bankruptcy Clause since the Framing.⁴²⁵

Thus, Congress cannot and should not do anything it wants under the guise of the Bankruptcy Clause. The proper public purpose of the bankruptcy power will be to provide this sort of relief to this person with this problem. The benefits of this remedy should thus not be available to dishonest or “fortunate” (wealthy) debtors who have taken improper advantage of the remedy. But punishment of that sort of misconduct likely involves many other powers. It is, for example, a subject either of state criminal law or any number of other regimes that exist to punish debtors who abuse their creditors or the systems in which they find themselves.⁴²⁶

A corollary would be that legislation enacted for essentially private purposes might be ultra vires the Bankruptcy Clause. We can find support for this in *Gibbons*, apparently the only Supreme Court cases striking down legislation under the Bankruptcy Clause. Here, the Court struck down last-minute congressional legislation intended to save the bankrupt Chicago, Rock Island, and Pacific Railroad Company from liquidation under the Bankruptcy Act of 1898 on uniformity grounds.⁴²⁷ The Court held that the Rock Island Railroad Transition and Employee Assistance Act (RITA) violated the uniformity condition of the Bankruptcy Clause as a law benefiting only a single debtor.⁴²⁸ In striking the law as analogous to a “private bankruptcy bill,”⁴²⁹ Justice Rehnquist observed:

425 I put to one side the important question of how this analysis plays out when the debtor is an entity, rather than an individual. The “honest-but-unfortunate” normative vision developed when debtors—merchants—were personally liable for obligations incurred in trade. Story himself apparently believed strongly that bankruptcy relief should not be available to corporations. See *Beaston v. Farmers’ Bank of Del.*, 37 U.S. (12 Pet.) 102, 137 (1838) (Story, J., dissenting) (“[Bankruptcy laws] apply exclusively to private persons; and cannot, without violence to the words and the objects of that act, be strained so as to reach corporations. I think that the persons intended by the act, are such persons only as may be brought within each of the predicaments stated in the act.”).

426 See, e.g., UNIF. FRAUDULENT TRANSFER ACT § 4, 7A U.L.A. 58, 58–59 (2006) (stating the elements of fraudulent transfer as to present and future creditors); *id.* § 5, 7A U.L.A. 129 (stating the elements of fraudulent transfer as to present creditors).

427 *Ry. Labor Executive Ass’n v. Gibbons*, 455 U.S. 457, 471 (1982).

428 *Id.* at 470–71

429 Some view the uniformity language of the Bankruptcy Clause as intended to forbid state legislation discharging individual debts (known as “private bankruptcy bills”). See, e.g., Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 56–57 (1983) (interpreting *Gibbons* to be a prohibition on private bankruptcy legislation); see also

Only Rock Island's creditors are affected by RITA's employee protection provisions Unlike the situation in the *3R Act Cases*, there are other railroads that are currently in reorganization proceedings, but these railroads are not affected by the employee protection provisions of RITA. . . . The . . . provisions of RITA cover neither a defined class of debtors nor a particular type of problem, but a particular problem of one bankrupt railroad. . . . RITA is nothing more than a private bill such as those Congress frequently enacts under its authority to spend money.⁴³⁰

Gibbons is important because it helps to define the bankruptcy power. It says not only that bankruptcy laws must be uniform, but that they cannot be "private" legislation. Congress cannot use the bankruptcy power to advance the largely private agenda of a group of select individuals or interests. Bankruptcy relief—or at least the discharge—must have some meaningfully public interest to come within the bankruptcy power. Otherwise, it is *ultra vires*.⁴³¹

C. *Debt and Democracy*

The public purposes of the bankruptcy power are not without limit. An important class of constraints should be reflected in the democratic and countermajoritarian protections the bankruptcy system uses, and how it uses them. As noted above, certain features of bankruptcy depend explicitly on voting by creditors and shareholders. In particular, creditors in Chapter 7 and Chapter 11 cases elect the debtor's trustee,⁴³² and creditors and other stakeholders vote on reorganization plans under Chapter 11.⁴³³ But bankruptcy also incorporates countermajoritarian protections—perhaps the most important being the construct of priority in right of payment.

Nadelmann, *supra* note 89, at 218–28 (discussing the full faith and credit problems created by private state bankruptcy discharges).

430 *Gibbons*, 455 U.S. at 470–71 (footnote omitted).

431 The force of *Gibbons* may be questioned as it rather weakly distinguished the *3R Act Cases* which, as discussed above, upheld reorganization legislation enacted for the benefit of the Penn Central Railroad. *See id.* at 470 ("[A] quite different sort of 'uniformity' question is presented in these cases. By its terms, RITA applies to only one regional bankrupt railroad. *Only* Rock Island's creditors are affected by RITA's employee protection provisions and *only* employees of the Rock Island may take benefit of the arrangement." (footnote omitted)); *see also* Baird, *Bankruptcy Procedure*, *supra* note 6, at 36 (noting *Gibbons*' inconsistency with the *3R Act Cases*). *Gibbons*' defects do not, however, undermine my basic claim that the discharge should be understood as a public right constrained by certain constitutional values, including that it have a public purpose.

432 11 U.S.C. §§ 702, 1104(b)(1) (2000).

433 *Id.* § 1126.

The notion that creditor democracy should determine the debtor's fate is rooted in English law, which established the institution before the Framing.⁴³⁴ It is intuitively appealing to believe that we tolerate some of the violence done by bankruptcy—the discharge in particular—because it is, at least in reorganization, “what the creditors wanted.” But the tyranny of majority rule can present real problems in bankruptcy, in at least two ways. First, and as noted in Part IV.B above, a concern in mass tort cases will involve whether bankruptcy's classification scheme assures tort creditors of adequate representation and voice in the process of voting on the plan. Creditors with today's medical bills are likely to have different preferences than creditors whose claims have not yet been made manifest. The voting process should assure that both sets of rightsholders have adequate voice.

Second, there are concerns about voting abuse. There is, as David Skeel has observed, a long history of vote manipulation in the context of railroad receiverships which, as discussed in Part III.B above, were the forerunners of our modern reorganizations.⁴³⁵ Here, widely dispersed bondholders would be asked to “deposit” their bonds with a “protective committee” formed and overseen usually by Wall Street professionals (investment bankers and lawyers).⁴³⁶ This committee would then have the capacity to “vote” the bonds for the proposed reorganization by consenting to the contract (“plan”) to restructure the railroad.⁴³⁷

Creditor franchise problems were perhaps most acute when senior and junior parties—banks and shareholder/managers—would “collude” in the formation of the plan. In many cases, the junior shareholders were permitted to retain their interest in the railroad even though the bondholders—who would have been senior to shareholders under a rule of strict priority—would be paid little if anything in the reorganization.⁴³⁸ This defiance of priority norms led the Supreme Court to develop a theory of “absolute priority,” first articulated in the 1899 *Louisville Trust* decision,⁴³⁹ where the Supreme

434 See MANN, *supra* note 1, at 1–76. Probably the best discussion of creditor voting in Chapter 11 cases appears in David Arthur Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 VA. L. REV. 461 (1992).

435 See SKEEL, *supra* note 266, at 48–70.

436 See *id.* at 58.

437 See *id.* at 58–60.

438 Lubben, *supra* note 226, at 1445 (“One of the most controversial features of receiverships was the frequency with which existing shareholders were able to maintain their position in the reorganized railroad, despite the failure to pay creditors in full.”).

439 *Louisville Trust Co. v. Louisville, New Albany & Chi. Ry.*, 174 U.S. 674 (1899).

Court struck a railroad reorganization for failing to make proper accommodation for bondholders.⁴⁴⁰ The rule of *Louisville Trust* came to be known as the “absolute priority rule,” with its most famous expression in *Case v. Los Angeles Lumber Products Co.*⁴⁴¹ *Case* held that reorganization plans had to be “fair, equitable and feasible,” and that these were “words of art”⁴⁴² that reflected the “‘familiar rule’ that ‘the stockholder’s interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors.’”⁴⁴³

A subtext in these railroad reorganizations is a concern about creditor democracy. Priority would protect bondholders when the vote would not because the bondholder interests were not adequately represented. To be sure, the shareholder/creditor franchise is not quite as important as the political franchise. Nor is it suggested that the absolute priority rule is a constitutional requirement. But the majoritarian features of both offer protections that any good constitutional theory of bankruptcy should recognize.

Notice also that priority serves a dual role in bankruptcy: by creating class voting, it preserves the franchise, but in its stronger forms—the secured claim—is effectively countermajoritarian. The secured creditor’s claim will be classified separately because it is not sufficiently “like” any others (no other creditors having exactly the same rights with respect to exactly the same thing). The secured creditor will have a veto unless the plan provides the secured creditor “fair and equitable treatment”—meaning, in effect, payments equal to the present value of the collateral, or something similar.

The countermajoritarian nature of priority, like the majority-protecting rules of creditor democracy, are each attributes of bankruptcy that mimic the larger constitutional system that gives rise to them. Any good conception of the constitutional limits of the bankruptcy power should reflect these values and develop their implications.

VI. WHAT’S AT STAKE

The preceding Part distinguished descriptive from prescriptive exceptionalism, and suggested ways in which the exceptionalism of

440 *Id.* at 684.

441 308 U.S. 106 (1939).

442 *Id.* at 115.

443 *Id.* at 116 (quoting *Louisville Trust Co.*, 174 U.S. at 684). Nor would side agreements between seniors and juniors (shareholders) be tolerated: “[A]ny arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation.” *Id.* (quoting *Louisville Trust Co.*, 174 U.S. at 684).

bankruptcy may be channeled and contained. But if, as Professor Lessig argues, constitutional theory should be “low down” and “near the data,”⁴⁴⁴ then the important question will be whether these insights help answer hard and realistic questions. This Part addresses three: (1) some that have already arisen under BAPCPA, (2) those that might arise in response to the subprime mortgage crisis, and (3) those that might arise in response to the continuing financial distress of religious organizations, such as Catholic dioceses.

A. BAPCPA

As discussed above, the *Katz* decision’s suggestive dilation of the Bankruptcy Clause could not have come at a worse time for many bankruptcy observers, given what Congress has actually done with that power recently.⁴⁴⁵ On April 20, 2005, after many years of contentious debate, Congress amended the Bankruptcy Code in order to “get tough” on allegedly fraudulent consumer debtors.⁴⁴⁶ The stated purpose of BAPCPA is to “improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.”⁴⁴⁷ Its legislative history stretches over almost a decade, but its essential goal—urged by the consumer credit industry—was a complex “means test” intended to prevent debtors who “can pay” from obtaining a discharge by requiring them to commence cases under Chapter 13 (governing “wage earner” plans) rather than Chapter 7 (straight liquidations).⁴⁴⁸

BAPCPA was about as controversial as bankruptcy legislation can get—which is to say very. Part of the controversy had to do with the way it came into being. The main lobbying forces for the bill were some of the nation’s leading consumer credit providers or their repre-

444 See Lessig, *supra* note 78, at 1838.

445 See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 373–79 (2006). For further discussion of *Katz*, see *supra* Parts II.B.3, III.A.

446 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11, 12, 18, 28 U.S.C.). A discussion of the legislative history of BAPCPA is set forth in Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

447 H.R. REP. NO. 109-31, pt. 1, at 2 (2005).

448 BAPCPA § 102(a), 119 Stat. at 27–33 (codified at 11 U.S.C.A. § 707(b) (West Supp. 2007)). The test requires that a Chapter 7 petition be dismissed or converted to Chapter 13 if it is determined that a debtor with primarily consumer debts will be able to pay unsecured creditors a specified amount in a Chapter 13 plan. See Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231–42 (2005).

sentatives, including Visa, MasterCard, Ford Motor Credit Corporation, and the General Motors Acceptance Corporation.⁴⁴⁹ As of March 2005, they had allegedly spent more than \$40 million in political fundraising and “millions more on lobbying efforts since 1989.”⁴⁵⁰ This was viewed as an extraordinary investment in legislation. Princeton economist Howard Rosenthal noted that “[i]t is rare to find such clear evidence of the effects of money’ in Washington politics.”⁴⁵¹

BAPCPA is widely viewed as the worst sort of private legislative failure.⁴⁵² Its early incarnation was “brought forward at the eleventh hour from a secret, closed-door conference [from] which the House minority was virtually excluded,” “written by and for the big banks, the credit card industry, and other special interest groups.”⁴⁵³ David Gray Carlson has observed that it is not only harsh, but also a technical disaster, riddled with drafting errors.⁴⁵⁴ According to Carlson, it actually encourages bankruptcy abuse by making it easier for wealthy debtors to hide assets and discharge debt.⁴⁵⁵

449 Stephen Labaton, *Bankruptcy Bill Set for Passage; Victory for Bush*, N.Y. TIMES, Mar. 9, 2005, at C5.

450 *Id.*

451 See Elizabeth Warren, Op-Ed., *Show Me the Money*, N.Y. TIMES, Oct. 24, 2005, at A21 (quoting Stephen Nunez & Howard Rosenthal, *Bankruptcy “Reform” in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process* 32 (Russell Sage Found., Working Paper No. 196, 2002), available at <http://www.russellsage.org/publications/workingpapers/BankruptcyReformInCongress/document>).

452 See, e.g., Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 457 n.3 (2005) (noting that some have taken to calling BAPCPA “by the fanciful acronym BARF (BANKrutcy ReForm Act)”); Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 284 (2005) (“It’s a behemoth of bad policy, an illiteracy of ill-conceived provisions, an underbelly of unintended consequences.”). It is not universally viewed this way. Professor Todd Zywicki is rare, if not alone, among legal academics in defending the technical and normative merits of BAPCPA. In testimony before the Judiciary Committee, Zywicki stated that BAPCPA was “fine as it is” and that “[t]here is no word that I would change in this particular piece of legislation.” See *In re Kane*, 336 B.R. 477, 481 n.7 (Bankr. D. Nev. 2006) (quoting *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing Before the Sen. Judiciary Comm. on S. 256*, 109th Cong. unofficial transcript (2005) (statement of Todd Zywicki)).

453 144 CONG. REC. 24928 (1998) (statement of Rep. Nadler).

454 See David Gray Carlson, *Means Testing: The Failed Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 227 (2007) (“BAPCPA adds a great amount of detail and is rife with bad draftsmanship, dumbfounding contradictions, and curious, even comical, special interest exceptions.”).

455 *Id.* (“The conclusion of my study is that the means test either encourages bankruptcy abuse or has no effect.”).

Perhaps not surprisingly, the first to mount major challenges to BAPCPA were lawyers. In a series of recent cases, lawyers have invoked First Amendment speech protections to challenge BAPCPA provisions requiring attorneys to advertise themselves as “debt relief agencies” and/or limiting their ability to counsel their clients on certain matters. In *Hersh v. United States*,⁴⁵⁶ for example, a Texas bankruptcy attorney sued the Attorney General of the United States and the Attorney General of Texas seeking a declaration that § 527(b) was unconstitutional.⁴⁵⁷ This section requires attorneys to provide “assisted persons” with written notice of specified information regarding bankruptcy.⁴⁵⁸ The court held that BAPCPA’s advertising provisions did not violate a lawyer’s speech rights under the First Amendment.⁴⁵⁹ The court reasoned that the advertising provision

advances a sufficiently compelling government interest and does not unduly burden either the attorney-client relationship or the ability of a client to seek bankruptcy. The government clearly has a legitimate interest in attempting to ensure that a client is informed of certain basic information before he or she commences a case in bankruptcy. The amount of debt discharged by bankruptcy in a given year can be tens of billions of dollars Thus, the government interest is significant.

Given that significant interest, the compelled speech of section 527 is a reasonable burden.⁴⁶⁰

In *Milavetz, Gallop & Milavetz P.A. v. United States*,⁴⁶¹ by contrast, the United States District Court for the District of Minnesota struck down both the advertising provisions and restrictions on advising a client about incurring additional debt in contemplation of bankruptcy as overly broad, and thus violating the First Amendment.⁴⁶² In denying the United States’ motion to dismiss, the court first considered whether the advice restrictions of § 526(a)(4) were unconstitutional.⁴⁶³ The court reasoned that the advisory restrictions were “a

456 347 B.R. 19 (N.D. Tex. 2006).

457 *Id.* at 21–22.

458 *See* 11 U.S.C.A. § 527(b) (2007).

459 *Hersh*, 347 B.R. at 27.

460 *Id.* (citation omitted). While *Hersh* upheld the advertising rules, it held that restrictions contained in § 526 on advice attorneys can give to potential debtor clients were unconstitutional. *See id.* at 24–25 (holding that the provision restricting advice was “overinclusive in at least two respects: (1) it prevents lawyers from advising clients to take lawful actions; and (2) it extends beyond abuse to prevent advice to take prudent actions”).

461 355 B.R. 758 (D. Minn. 2006).

462 *Id.* at 763–67.

463 Section 526(a)(4) states:

content-based regulation of attorney speech” because they “restrict[] attorneys from giving particular information and advice to their clients.”⁴⁶⁴ The court rejected the government’s argument that the restrictions were supported by compelling interests in discouraging debtors from “‘gaming’ the means test by improperly enlarging pre-existing debt, thereby diluting the assets of the bankruptcy estate available to creditors.”⁴⁶⁵ The court concluded that the government’s interest not only failed a compelling interest test—it did not even make sense. “Incurring debt on the eve of bankruptcy can scarcely be considered *malum in se*. To the contrary, for some individuals[,] incurring further obligations, even those which must be adjusted or set aside in the bankruptcy, may be financially prudent.”⁴⁶⁶

The *Milavetz* court also rejected the government’s claim (and the reasoning of *Hersh*) that there was a compelling interest in regulating bankruptcy-related advertising as contemplated under Bankruptcy Code § 528. Here, too, the court found that the statute failed to accomplish its purported purpose, in this case protecting the public from misleading claims about debt relief. BAPCPA’s definition of a “debt relief agency,” the court observed, was so broad as to sweep together both lawyers and nonlawyers providing bankruptcy and similar services: “The requirement that parties so dissimilarly-placed must use the same mandated disclosure statement is likely to cause consumer confusion. In this respect, § 528 fails to directly advance the government’s stated interest in clarifying bankruptcy service advertisements.”⁴⁶⁷ Nor was it sufficiently narrow: “This sweeping regulation goes beyond whatever problem it was designed to address. It broadly regulates absolutely truthful advertisements throughout an entire field of legal practice.”⁴⁶⁸

The maneuvering over the attorney rules in BAPCPA is important, but may distract us from what are arguably more fundamental problems with the legislation. These provisions may flunk First

A debt relief agency shall not . . . advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

11 U.S.C.A. § 526(a)(4) (West Supp. 2007), *invalidated by Hersh*, 347 B.R. 19.

464 *Milavetz*, 355 B.R. at 764 (“Attorneys are forbidden to advise their clients concerning an entire subject—incurring more debt in contemplation of filing for bankruptcy. This is a plain regulation of speech.”).

465 *Id.* at 765.

466 *Id.*

467 *Id.* at 767.

468 *Id.*

Amendment scrutiny. But they may also simply be outside the scope of Congress' bankruptcy power. If, as discussed in the Introduction, we view the Bankruptcy Clause as creating, among others, the powers to manage intercreditor disputes, distribute a debtor's assets, remedy fraud, and discharge the debts of the "honest but unfortunate" debtor, then provisions regulating attorney advertising or the attorney-client relationship seem suspect.⁴⁶⁹ Preventing a debtor from receiving legal advice about debt would seem not to have much to do with adjusting the existing relations between debtors and creditors. This would be public interference with private arrangements—the attorney-client relationship—that could not credibly come within the bankruptcy power. Of course, if the advice was to incur indebtedness with the intention of harming other creditors, we no longer have an honest but unfortunate debtor. But that raises a host of other problems, which would likely be addressed by other (state) laws.

B. Subprime Mortgage Crisis

BAPCPA is already on the books, and is already being challenged on certain constitutional grounds: some of those challenges might succeed. But it is hardly the only possible source of constitutional conflict involving bankruptcy on the horizon. Consider next some possible congressional responses to the subprime mortgage crisis.

It is already well known that the explosive growth in residential real estate values of recent years was fueled in part by subprime financing, lending to those whose credit may not in fact have warranted a mortgage under traditional lending standards. Home mortgage lenders have reported significant spikes in defaults.⁴⁷⁰ With more than two million hybrid adjustable rate mortgages (ARMs) scheduled to "reset" in fall 2007—peaking in October with more than \$50 billion due—it would be easy to imagine that Congress might be tempted to amend the Bankruptcy Code to provide relief.⁴⁷¹ Consider the following hypothetical:

Congress enacts the "Helping Families Avoid Foreclosure Act" of 2008 ("the Act"). The Act amends, among other things, Chapters 7, 11, and 13 of the Bankruptcy Code to recognize a new type of debtor, the "subprime debtor."

469 See Plank, *Limits*, *supra* note 6, at 491–92 (arguing that the bankruptcy power should be limited to legislation governing relations between an insolvent debtor and his creditors).

470 See, e.g., Gretchen Morgenson, *More Home Foreclosures Loom as Owners Face Mortgage Maze*, N.Y. TIMES, Aug. 6, 2007, at A1.

471 See Les Christie, *Mortgage Reset: Record Bill Coming Due*, CNNMONEY.COM, Aug. 13, 2007, http://money.cnn.com/2007/07/09/real_estate/resets_are_coming/index.htm.

Subprime debtors are those whose primary residence is subject to a subprime mortgage (as defined), and who did not engage in any fraud or deception in procuring the loan. The Act would empower the subprime debtor, with or without consent of the lender, to adjust the subprime mortgage in bankruptcy by (1) reducing the outstanding amount to the present judicially appraised value of the property; (2) preventing the upward adjustment of any adjustable mortgage above the initial "teaser" rate; (3) preventing the mortgagee from foreclosing for a period of three years from the commencement of the case, provided that the debtor makes "reasonable" monthly payments (e.g., those at the "teaser" rate); and (4) providing that the debtor may prepay the loan at the reduced rate without regard to any prepayment prohibition or penalty. Can Congress do this?

This hypothetical⁴⁷² would go to the heart of the retroactivity problem discussed in Part IV.A above. It would pit Congress' acknowledged power to enact bankruptcy legislation against the Takings Clause of the Fifth Amendment. Mortgagees affected by this legislation would have credible arguments that the Act would substantially impair vested interests in their debtors' property, interests which cannot be "taken" without compensation.

Under the analysis proposed in this Article, since the lien is a property interest, the first question is whether the Act would provide a bankruptcy remedy for an "honest but unfortunate debtor." Assuming the debtors in question did not collude with their lenders, or otherwise engage in misconduct in order to obtain the loan (and this may be a hard determination in many cases), the legislation would satisfy this criteria.

The next question is whether the Act contains sufficient democratic or countermajoritarian protections to pass constitutional scrutiny. Here, the Act would provide the lender no meaningful franchise if the subprime debtor can force the lender to accept inferior terms. The important question then becomes whether the Act contains sufficient countermajoritarian protections for the lender's priority interest in the subprime debtor's property. The resolution of this question should turn, at least in part, on the legitimacy of the appraisals. If the mortgagees can show that the appraisals unfairly or arbitrarily reduce the value of the subject properties, then cases like *Radford*, *Security Industrial Bank*, and the *3R Act Cases*, discussed in Part IV.A above,

⁴⁷² This might not be so hypothetical. See *supra* note 32; see also Les Christie, *Subprime Solution: Swap ARMs for Fixed-Rates*, CNNMONEY.COM, Apr. 18, 2007, http://money.cnn.com/2007/04/18/real_estate/foreclosure_bailouts_/index.htm ("Panel members at a Congressional hearing on the subprime crisis recommend changing the terms of ARM loans to forestall foreclosures.").

suggest that they should have a remedy. Of course, as the *3R Act Cases* suggest, that remedy may be recovering from the government itself.⁴⁷³

If a court concluded that the Act provided inadequate democratic or countermajoritarian protections for mortgagees, and offered no Tucker Act compensation, the Court may then engage in the sort of balancing suggested in Part IV.A above: was the financial crisis Congress addressed in the Act so dire as to warrant this sort of invasion into vested property rights? This question cannot be answered today. The answer would depend in part on the depth of the subprime mortgage crisis and the reasonableness of Congress' view of it. It would, however, be consistent with a view that the Bankruptcy Clause creates the exceptional power to address serious existing financial crises.

C. Diocesan Debtor Dilemmas

A third set of problems that may credibly arise in the near future would involve the bankruptcy reorganizations of the various Catholic dioceses. The diocesan bankruptcy cases to date have been resolved in more or less consensual ways. But it is not difficult to imagine a bankruptcy judge losing patience with a recalcitrant bishop, who refuses to carry out the duties imposed upon him as management of the diocesan debtor in possession. Consider the following hypothetical:

Facing millions of dollars in liability from priests' sexual misconduct, Diocese X ("the Debtor") commenced a Chapter 11 bankruptcy case. While the Debtor has assets sufficient to make meaningful partial payments to its tort creditors, it would have to sell valuable church properties in order to do so. The Debtor's tort creditors demand that the Debtor sell these properties to fund its plan of reorganization. The Debtor's management, Bishop Y, refuses, arguing that these properties are held in trust for the benefit of parishioners recognized in canon law, but not state private law. Bishop Y has also refused to negotiate or share confidential books and records with the creditors' committee. Without information about the Debtor, the creditors' committee is unable to propose a meaningful reorganization plan, even though the Debtor's exclusive right to file such a plan has expired.

Faced with these problems, the Bankruptcy Court, on motion of the creditors' committee, appoints a Chapter 11 trustee ("the Trustee") who takes over management of the Debtor's affairs and properties. The order of appointment assures Bishop Y and the Debtor's parishioners that Bishop Y and his clerics may continue to perform religious duties during the case. The Trustee proposes the following plan ("the Plan"), which enjoys the overwhelming support of creditors: (1) all of the Debtor's property except the main church facility will be sold,

473 See *supra* notes 347–51 and accompanying text.

with the proceeds to be distributed to creditors; (2) these properties include smaller parish churches, parochial schools, and a hospital; (3) all of the clerical staff except Bishop Y and an assistant will be laid off; (4) although the main church facility will continue to be used for worship (in services to be led by Bishop Y or a bishop designated by the church), it will also be used to hold nightly bingo games, the proceeds of which will also be used to pay creditors. Can the Bankruptcy Court constitutionally approve this plan?

This hypothetical squarely presents the competition between the bankruptcy power and the First Amendment discussed in Part IV.C above. As with the preceding hypothetical, the scope of the bankruptcy judge's power should be determined in light of the nature of the bankruptcy power. The first question is, on the analysis set forth in this Article, whether the Debtor is of the "honest but unfortunate" variety. Here, as with any entity, it will be important to distinguish the various stakeholders. Certainly, priests who have committed sexual abuse—and bishops who have concealed this—would not qualify. But the entity also reflects the interests of others, including creditors and parishioners. As to these individuals, it is proper to conceive of the entity as "honest but unfortunate" since these stakeholders should, under conventional notions of priority, succeed to control and/or "ownership" of the debtor.⁴⁷⁴

Assuming the Debtor qualifies in this normative respect, the next question is whether the bankruptcy process embodies adequate democratic and countermajoritarian protections. Creditor support for the Plan suggests that the franchise has been satisfied. But what about the rights of parishioners? If they are not creditors—and probably they are not—they will lack standing to vote on the Plan. It will not likely be possible to give parishioners a vote either. Not being creditors, there is no "amount" that would be used to calculate their vote under Bankruptcy Code § 1126.

Are there nevertheless countermajoritarian protections for the parishioners? The *Latter-Day Saints* cases, discussed in Part IV.C above, suggest the Court has historically had little interest in protecting the property interests of religious debtors. There is no obvious reason why the Court would view the parishioners—who likely have no interest in church property cognizable at state law—more sympathetically. The important question would then become whether the

474 Of course, on this view, many entities will be "honest but unfortunate," even if used by the dishonest to perpetrate a fraud. See *supra* note 425. I also put to one side the somewhat artificial dictates of the "*in pari delicto*" doctrine, which holds that a corporation used to perpetrate a fraud may be at equal fault with the perpetrators. See, e.g., Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 358 (3d Cir. 2001).

continued, if diminished, role of Bishop *Y* sufficiently protects the religious liberty interests of the parishioners and the bishop himself. This would be a difficult determination for a court to make. It should be a question the court tries to avoid. If it cannot, however, the better answer would be to confirm the Plan. The minimal protections for the parishioners appear greater than those accorded in the *Latter-Day Saints* cases. This countermajoritarian protection would help guide and justify what is admittedly a difficult decision.

CONCLUSION

The preceding Part considered three sets of constitutional questions that bankruptcy has presented or may present in the foreseeable future. While reasonable minds can differ on their resolution, the purpose here has been to identify the deeper puzzles and themes in bankruptcy's constitutional role, and to begin to develop a framework for addressing those puzzles and themes.

That framework should recognize that bankruptcy has long been about the scope of the polity. The first English bankruptcy statute was enacted to deal with the growing number of debtors who, after "craftily obtaining into their hands great Substance of other men['s] goods, do Suddenly flee to parts unknown."⁴⁷⁵ The practice of "keeping house" or seeking sanctuary in the church were equally forms of evading debt by escaping the reach of the state.⁴⁷⁶ To this extent, if no other, bankruptcy is intimately bound up with the nature and power of government.

But the polity's great aspirations, as expressed in the Constitution, have often fit awkwardly with those of bankruptcy. Bankruptcy has thus involved a series of exceptions—to the types of rules the Constitution permits Congress to create, and to the rules, standards, norms, and values that animate the Constitution's organic, structural, and substantive elements. There is an important relationship between debt and democracy—a relationship that warrants further exploration.

⁴⁷⁵ 34 & 35 Hen. 8, c. 4, § 1 (1542–1543) (Eng.).

⁴⁷⁶ See MANN *supra* note 1, at 26 ("Some debtors kept to their houses—sometimes for years—where they were safe from service of process.").